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No. 12562

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United States
Court of Appeals
for the Ninth Circuit.

26
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No 12561

LIBBY, McNEILL & LIBBY, a Corporation,
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Insurance Commissioner, At-
torney General of Alaska and the Territorial
Commissioner of Labor and Peter Lathourakis,
Appellees.


Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
First Division

FILED

JUL 24 1950

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

R. E. ROBERTSON,

Seward Building,
Juneau, Alaska,

For Appellants.

HENRY RODEN,

Juneau, Alaska,

For Appellee Peter Lathourakis.

J. GERALD WILLIAMS,

Territorial Attorney General,

Juneau, Alaska,

For Appellees—Alaska Industrial
Board et al.

1949

DOCKET ENTRIES

- Nov. 2—Filed from Anchorage, Alaska.
Nov. 4—Alias Summons issued.
Nov. 5—Summons returned unserved 11/5/49 and filed.
Nov. 7—Alias Summons ret'd, served (11/7/49) and filed.
Nov. 9—Stipulation filed.
Nov. 9—Answer of Defendant Lathourakis.

1950

- Jan. 11—Motion to Set for Hearing filed.
Jan. 13—Minute Order—Case set for trial to follow 6075-A or about Wednesday next.
Jan. 21—Brief of Plaintiff filed.
Jan. 18—Minute Order—Case before Court for hearing on appeal.
Jan. 19—Argument cont'd. Files of Ind. Bd. filed. Under advisement.
Feb. 15—Court's Opinion filed.
Mar. 16—Minute Order—Motion for Judgment filed.
Mar. 24—Minute Order—Upon Claimants Motion for Judgment Court signed same. Court set Supersedeas Bond at \$5,000, with which Attorney for Lathourakis concurred.
Mar. 24—Judgment filed and entered.
Apr. 3—Notice of Appeal filed. Copy served on Alaska Indust. Bd.
Apr. 3—Supersedeas on Appeal filed.
Apr. 18—Designation of Contents of Record on Appeal and Statement of Points filed.
May 9—Designation of Contents of Record on Appeal filed.

COMPLAINT AND APPEAL FROM DECISION
AND AWARD OF ALASKA INDUSTRIAL
BOARD UNDER "THE WORKMEN'S
COMPENSATION ACT OF ALASKA."

Comes now the plaintiff and appeals to the District Court for the Territory of Alaska, Third Judicial Division, from that certain decision and award, hereinafter mentioned, of the defendant Alaska Industrial Board and complains and alleges:

I.

That the plaintiff, Libby, McNeill & Libby, is now and at all the times hereinafter mentioned was a corporation organized and existing under the laws of the State of Maine and engaged and authorized to engage in business in the Territory of Alaska; that it has paid its annual corporate license tax last due to the Territory of Alaska; that it has filed with the Auditor of the Territory of Alaska and with the Clerk of the District Court for the Third Judicial Division of Alaska its last annual report required to be filed by it by the laws of Alaska; that it has complied and at all times hereinafter mentioned had complied with the provisions of Section 18, Chapter 9, Extraordinary Session Laws 1946, Sec. 43-3-18, ACLA 1949, as a self-insurer under said Chapter 9 and does now and at all of said times did hold a certificate as a self-insurer under said law from the defendant, Alaska Industrial Board.

II.

That the plaintiff was at all the times hereinafter mentioned engaged in the operation of a salmon

cannery at Libbyville, Alaska, and had in its employ three or more employees.

III.

That the Alaska Industrial Board, hereinafter designated as Board, was created and now exists by virtue of the provisions of Chapter 9, Extraordinary Session Laws 1946, Sections 43-3-1 to 43-3-39, both inclusive, ACLA 1949, known as the Workmen's Compensation Act of Alaska, hereinafter designated as "Compensation Act" and under said Compensation Act its membership is composed of the following three persons, namely: The Territorial Insurance Commissioner, Attorney General of Alaska, and the Territorial Commissioner of Labor; that Frank A. Boyle is now and at all the times hereinafter mentioned was the Territorial Insurance Commissioner; that J. Gerald Williams is now and at all the times hereinafter mentioned was Attorney General of Alaska; that Henry A. Benson is now and at all the times hereinafter mentioned was Territorial Commissioner of Labor and the Chairman and executive officer of the defendant Alaska Industrial Board.

IV.

That the relationship of employer and employee existed between the plaintiff and one Peter Lathourakis on July 16, 1948, who was then employed by it as a fisherman in the operation of said salmon cannery by a term of employment beginning on or about June 25, 1948.

V.

That on or about April 13, 1949, Peter Lathourakis, hereinafter designated as Claimant, made his written application for Adjustment of Claim to the Alaska Industrial Board to obtain "compensation for temporary total disability as a result of injury to arm, chest and esophagus until condition becomes fixed, and then a partial permanent disability determined," which injury he claimed to have been incurred on July 16, 1948, and which compensation he claimed he was entitled to receive under the provisions of said compensation act; that a true copy of said application is attached hereto, marked Exhibit I, and made a part hereof.

VI.

That plaintiff herein, on or about May 26, 1949, filed with said Board its admission of service of and answer to said claim; that a true copy of said Answer is attached hereto, marked Exhibit II, and made a part hereof.

VII.

That on August 30, 1949, a hearing was held before said Board upon said claim, and all the evidence adduced at said hearing, together with the complete file of the Board upon said claim, subject to the objections of the plaintiff herein made at and prior to said hearing, is hereby made a part of this complaint, and the plaintiff herein hereby requests said Board to submit said file to the Court.

VIII.

That hereafter and on September 28, 1949, the defendant Board by all of its said members made and entered its certain decision and award, a true and correct copy whereof, marked Exhibit III is hereunto attached and specifically made a part hereof, but notice and copy whereof was not given to plaintiff herein until October 1, 1949.

IX.

That said decision and award is erroneous in that:

1. The Board has no power or authority to use, as a factor in computing said claimant's average daily wages, the sum of \$1500.00, or any other sum which was not actually earned by the claimant but which he claims was the value of his own work for himself upon his own boat and which he further claims he could have earned from others and which would have been his earnings had he done said work for others instead of for himself.

2. The Board has no power or authority to award temporary disability, either total or partial, in the sum of \$3,833.55, or any other sum, and also to award permanent partial disability in the sum of \$3,600.00, or any other sum.

3. That the Alaska Workmen's Compensation Act does not authorize or empower the award of compensation for both temporary disability, either partial or total, and permanent disability either partial or total, for such injuries as the claimant

claims he sustained and, if compensation for permanent disability, either partial or total, be awarded him, then no compensation can be awarded to him for temporary disability, either partial or total.

4. That the Board has no power or authority to allow an attorney fee of \$1100.00, or any other sum, to applicant and to order, if such is the intention of the award, that such attorney fee be paid by the plaintiff, in addition to the award of compensation of \$7433.55, or in any other sum, to the claimant for any alleged injuries suffered by him.

5. That no competent evidence was adduced of the claimant's having suffered 50% or any permanent disability whatsoever by reason of a personal injury arising out of and in the course of his employment by the plaintiff on July 16, 1948, or at any time, and that said award is not based upon any competent evidence.

6. That the Board in its said award entirely ignored the uncontradicted evidence that claimant engaged in his customary occupation of fishing and made and received his customary earnings in that occupation during the salmon fishing season of 1949.

X.

That the place where plaintiff's said fishing operations were conducted is now and then was in the Third Judicial Division of Alaska and within the jurisdiction of the District Court for the Territory of Alaska, Division Number Three, at Anchorage, Alaska.

XI.

That plaintiff prosecutes this its appeal in good faith and not with the intent to fail or refuse to pay to the clamiant such, if any, sums as may be finally awarded to him; that plaintiff is advised by legal counsel that said award is contrary to the law and to the evidence.

Wherefore, Plaintiff appeals to the District Court for the Territory of Alaska, for the Third Judicial Division and prays that said decision and award of the Alaska Industrial Board may be entirely suspended and set aside, and for such other and further relief as may be meet and equitable in the premises.

Respectfully submitted,

PLUMMER & ARNELL.

EXHIBIT I

Copy

Territory of Alaska

Alaska Industrial Board

Application for Adjustment of Claim
Alaska Workmen's Compensation Act

Note:—Either party to the dispute may apply to the Board for adjustment of any matter in difference. The original application and two copies for the defendant must be mailed to Board at Juneau, Alaska. Due notice will thereafter be given of the time and place of hearing. Either party may be represented in person, by agent or by attorney.

PETER LATHOURAKIS,

Applicant,

vs.

LIBBY, McNEILL & LIBBY,

Defendant.

Applicant's Address: c/o Roy E. Jackson, 1207 American Building, Seattle, Washington.

Defendant's Address: 87 Hamlin Street, Seattle, Washington.

1. Peter Lathourakis, age 60, while employed as fisherman on July 16, 1948, at Libbyville, Alaska, by Libby, McNeill & Libby, who is subject to the Act, sustained injury arising out of and in the course of said employment as follows: Claimant's fishing boat in tow of monkey boat struck barge head-on at about 25 miles per hour, resulting in crushing injury to right arm and severe injury to chest, esophagus and abdomen.

2. Injured left work on July 16, 1948, and disability continued to present time.

3. Last payment of compensation on Oct. 14, 1948; last medical furnished by employer on Oct. 14, 1948. Notice of injury given employer on July 16, 1948.

4. Medical and surgical treatment has been rendered by Libby Hospital, Koggiung; Dr. A. Bernard Gray, Seattle; Marine Hospital, Seattle; and Dr. H. W. Reimer, Seattle.

5. Employee's wages were \$83.10 per day, working 6 days per week plus \$1.00 per day for board. Season earnings 6-25 to 7-24 \$2493.21, plus board of \$30.00.

6. Total compensation paid to date \$1050.80.

7. Injured was married, and had two dependents, as follows: John, age 21, and Helen, age 18, attending school and living at home.

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this application is: To obtain compensation for temporary total disability as a result of injury to arm, chest, and esophagus, until condition becomes fixed and then a permanent partial disability determined.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Seattle, Washington, April 13, 1949.

/s/ ROY E. JACKSON,
Attorney for applicant.

/s/ PETER LATHOURAKIS,
Applicant.

EXHIBIT II

Copy

Territory of Alaska
Alaska Industrial Board

PETER LATHOURAKIS,

Applicant.

vs.

LIBBY, McNEILL & LIBBY,

Defendant.

ADMISSION OF SERVICE AND
ANSWER TO APPLICATION

The defendant above named for answer to the application herein respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in application.
2. It is admitted that both the employer and employee were subject to the Alaska Workmen's Compensation Act at the time of the alleged injury.
3. It is admitted that the relationship of employer and employee existed at the time of injury.
4. It is admitted that at the time of the alleged injury the employee was performing service arising out of and in the course of employment.
5. It is admitted that Notice of Injury was given employer as set forth in application.
6. It is denied that the applicant was temporarily disabled for the period stated in the application.

7. It is denied that the applicant was permanently disabled to the extent shown in application.

8. It is denied that the rate of wages as set forth in the application is correct, but that his daily average earnings while in the employ of defendant were \$21.846 a day which were more than his average daily wages throughout the remainder of the year when not working for the defendant. The defendant will insist that all evidence must be adduced according to legal rules for the admission of evidence and that it is otherwise inadmissible, and will object to all ex parte evidence offered to prove or seek to prove any of the facts upon which the claimant bases his claim and the defendant will insist upon having a hearing before the full membership of the board.

Dated at Juneau, Alaska, May 26, 1949.

LIBBY, McNEILL & LIBBY,
Defendant.

By /s/ R. E. ROBERTSON,
Attorney for Defendant.

EXHIBIT III

Alaska Industrial Board

Juneau, Alaska

Case No. 8-7-36

PETER LATHOURAKIS,

Applicant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,
Defendant.

BOARD DECISION AND AWARD

(Full Board)

Pursuant to the application of above-named applicant, the matter came on for hearing before the full board. Applicant was present in person and represented by Attorney Henry Roden. Defendant employer, self insured, was represented by Attorney R. E. Robertson. From testimony presented at the hearing and the files and records in the case, the Board considered the case on its merits and finds as follows:

Facts

Applicant, Peter Lathourakis, was employed as a commercial fisherman by defendant at Libbyville, Bristol Bay, Alaska, during the season of 1948 and had been so engaged for various employers in Bristol Bay for some 20 years.

On July 16, 1948, while his boat was being towed

to a scow a collision occurred which resulted in serious injury to Lathourakis, requiring that he be immediately taken to the hospital at Libbyville for emergency treatment and then sent to Koggiung. He was unable to swallow solid foods.

About July 24 applicant was transported to Seattle and placed under care of Bernard Gray, employer's physician, who treated the injured arm. The second day after his treatment by Dr. Gray began, Lathourakis told the Doctor of his difficulty in swallowing and his inability to eat solid foods. X-rays were then taken of the esophagus, and which revealed an organic lesion which had the appearance of carcinoma. Dr. Gray then referred Lathourakis to Dr. Julius Webber who performed an esophagoscopy and found an organic lesion of the walls of the esophagus. A biopsy was made which was diagnosed as "a developmental anomaly with a question of an early adenocarcinoma arriving in the cardiac glands of the esophagus."

Upon the basis on Dr. Webber's diagnosis, Dr. Gray advised Lathourakis that he probably had a cancer which should have surgical treatment and arrangements were made for Lathourakis to enter the Marine Hospital. Dr. Gray advised Lathourakis that the treatment for the cancer would not be paid by the employer.

On September 15, Lathourakis entered the Marine Hospital and his examination and treatment began. After two weeks he was advised that he probably had a cancer and should undergo surgery.

His condition had not materially changed. He refused surgery and was discharged from the Marine Hospital against medical advise.

Upon the advice of Dr. Gray and the solicitation of members of his family he returned to the hospital on October 7th willing to undergo surgery.

He had lost about 40 pounds in weight since his injury and for the 3 days prior to hospitalization had been unable to swallow anything.

On October 10th an exploratory thoracotomy and an exploration of mediastinum was performed. The operation required the collapse of the lung, the removal of the 8th rib and opening up the chest. No cancer was found. To correct the inflamed condition of the esophagus the stomach was put up to the middle third of the esophagus and supported in position by sewing it to the chest wall and the vertebral column. The diaphragm was then sewn to the stomach, the lung re-expanded, and the chest closed. Dr. McGowan, who performed the operation, stated that the lesions found in the esophagus were analagous to stomach ulcers, resulting in a narrowing of the esophagus so as to prevent swallowing.

Following the operation both Dr. Gray and Dr. McGowan revised their earlier diagnosis of early cancer in no way related to trauma to a conclusion that Lathourakis was suffering from a pre-existing condition of a congenital nature wholly unrelated to the injury suffered in the collision at Bristol Bay on July 16th. However, medical

opinion expressed by other physicians who examined the clinical records and history lead to the inescapable conclusion that the derangement of the esophagus is directly traceable to the injury of July 16, since Lathourakis prior to his injury had been an exceptionally vigorous man with no indication of any kind that he was suffering a congenital anomaly of the esophagus.

Applicant's temporary total disability continued from July 19, 1948, to May 20, 1949.

His earnings during the year 1947 totalled approximately \$5,300.00 and in addition thereto Lathourakis performed \$1500 work on his own boat during time he might have had employment for wages in an equal amount, for a total annual wage earning capacity of \$6,800 during the year 1947, making a daily wage earning capacity of \$18.73.

Lathourakis was employed during the 1949 season by Peninsula Packing Company as a fisherman in Bristol Bay in disregard of his disability because of his outstanding productive record in Bristol Bay, having for years been top producer among all Bristol Bay fishermen. His superintendent stated that he was no longer able to perform the duties of a fisherman and had been hired because of his knowledge of fishing and familiarity with the Bay.

His permanent disability consists of a residual weakness in his right hand, lack of stamina and endurance, shortness of breath, and difficulty in performing any manual labor due to the restricted

diet he is compelled to follow. The degree of permanent partial disability may reasonably be computed at 50% of total permanent disability related to loss of earning capacity.

Lathourakis is married.

Consideration of Applicable Law

Applicant suffered a temporary total disability and a permanent partial disability by reason of a personal injury by accident arising out of and in the course of his employment by defendant on July 16, 1948.

Such disability being compensable under the Alaska Workmen's Compensation Act.

Award

In view of the foregoing findings of fact and conclusions of law the Board hereby awards applicant, Peter Lathourakis, the sum of \$3,833.55, which represented 315 days compensation at the rate of \$12.17 per day less \$1,050.80 already paid by defendant, employer, plus interest at 8% per annum from date due until paid, plus the further sum of \$3600.00, representing the compensation for permanent partial disability on the basis of 50% of permanent total disability for a married man.

Applicant is awarded reimbursement for all necessary medical expenses incurred by reason of his injury and recovery during the year following the day of injury.

Applicant's attorney's fee is hereby fixed at \$1,100.00.

ALASKA INDUSTRIAL
BOARD,

HENRY A. BENSON,
Chairman.

HENRY A. BENSON,
Commissioner of Labor.

J. GERALD WILLIAMS,
Member.

J. GERALD WILLIAMS,
Attorney General.

FRANK A. BOYLE,
Member.

FRANK A. BOYLE,
Insurance Commissioner.

Dated at Juneau, Alaska, this 28th day of September, 1949.

Duly verified.

[Endorsed]: Filed October 27, 1949.

STIPULATION

Counsel for plaintiff corporation, Mr. R. E. Robertson and Counsel for defendant Alaska Industrial Board, do hereby stipulate that one Peter Lathourakis may be made a party defendant in the above-entitled cause.

Dated at Juneau, Alaska, Nov. 7, 1949.

/s/ R. E. ROBERTSON,
Attorney for Plaintiff
Corporation.

/s/ J. GERALD WILLIAMS,
Attorney for Defendant
Alaska Industrial Board.

ANSWER OF DEFENDANT LATHOURAKIS

The defendant Peter Lathourakis, answering plaintiff's complaint in the above-entitled cause, denies and alleges as follows, to wit:

Denies all the allegations, matters and things contained in paragraph nine of said complaint and the whole thereof except the allegations contained in subsection 4 of said paragraph nine.

/s/ HENRY RODEN,
Attorney for Peter
Lathourakis.

United States of America,
Territory of Alaska—ss.

Henry Roden, being first duly sworn, on oath deposes and says: I am the attorney of Defendant Peter Lathourakis, whose answer to plaintiff's complaint is as aforesaid. I have read said answer, know the contents thereof and that the same is true, as I verily believe. I make this verification on behalf of said defendant Lathourakis who is not now at Juneau, Alaska, the place where same is made.

/s/ HENRY RODEN,

Subscribed and sworn to before me this 7th day of November, 1949.

[Seal] /s/ L. MARIE JENSEN,
Deputy Clerk, U. S. District Court, First Division, Territory of Alaska.

APPELLANT'S OBJECTIONS

4. That it contends that evidence must be adduced in a legal manner, and not ex parte, and is entitled to the right of cross-examination of all of claimant's witnesses.

5. That it demands a hearing before the full board with all members of the board present.

6. That the law does not authorize or permit a hearing to be held upon the extent of alleged

temporary disability and a later hearing upon partial permanent disability.

7. That claimant has, if any, only one claim.

8. The Board has no power or authority to award both temporary disability and permanent partial or total disability and, if any permanent partial or total disability is awarded, then no temporary disability can be awarded.

Respectfully,

R. E. ROBERTSON,
Attorney for Defendant.

Copy received June 27, 1949.

DEPOSITION OF PETER LATHOURAKIS

Those present in the offices of the Alaska Industrial Board were Henry Roden, attorney for applicant, applicant Peter Lathourakis, attorney for defendant R. E. Robertson and Board Members Henry A. Benson, Frank A. Boyle and J. Gerald Williams.

Applicant was sworn in by the Chairman of the Board.

Direct Examination

By Henry Roden:

Q. What is your name?

A. Peter Lathourakis.

Q. Where do you live?

(Deposition of Peter Lathourakis.)

A. 338 W. 77th, Seattle, Washington.

Q. How old a man are you? A. 60 years.

Q. What is your business? A. Fisherman.

Q. How long have you been a fisherman?

A. Since 1922.

Q. In 1948 did you do any fishing?

A. Libby at Bristol Bay.

Q. When did you go up there?

A. June 25.

Q. You were examined by Cannery doctor?

A. Yes, by Dr. Gray.

Q. On the 16th of July what were you doing?

A. I was fishing.

Q. Did anything out of the way happen that day?

A. We were being towed by power boat to scow to deliver the fish when I got hurt.

Q. Tell these gentlemen how the accident occurred.

A. While maneuvering around scow, power boat that was pulling us made a sharp turn and we ran into the barge at about 25 miles an hour.

Q. Whose fault was that?

A. The power boat man.

Q. You hit the barge at 25 miles per hour?

A. Yes, just before that I was in bow from where I jumped down into forecastle and held onto the mast. If I had jumped overboard I'd have had no chance. I put my right arm around mast. Then the topside of barge hit the mast, caught my arm and head on mast. I then dropped down into the forecastle.

(Deposition of Peter Lathourakis.)

Q. What happened then?

A. We hit another barge. After the accident I was all played out and took a little drink of gin which we keep on the boat for cold weather. I took a little drink and right away and right away puked up.

Q. After that you were sick to your stomach?

A. So I suffer from pain, the arm and chest was black and numb.

Q. What happened then?

A. I was taken in to hospital and cleaned up as I was all bloody. I was put to bed and next day I was taken to Koggiung.

Q. Where did you go to there?

A. To hospital and doctor.

Q. Who was doctor?

A. I don't konw, one old man. I stay five days.

Q. What did the doctor do to you?

A. After couple hours the doctor asked me how I feel. My arm was swelled up like a balloon and was all black and blue. Then he grabbed my hand and juggled it. Christ, the killed me. I told the doctor not to do that any more or I'll kick you. They had no x-rays up there.

Q. How long at Koggiung?

A. 5 days, the put cast on.

Q. What time did you get to Seattle.

A. About 23 July.

(Deposition of Peter Lathourakis.)

Q. What happened when you got to Seattle?

A. I got in and stayed home Saturday and Sunday and Monday morning went to see Dr. Gray with piece of paper from Cannery. They took x-ray.

Q. What did they do then?

A. Told me to come every morning at 10 o'clock.

Q. Did you get any better?

A. I told doctor about chest that I couldn't eat any solid food.

Q. How did you eat after July 16?

A. They bring me beef and potatoes. I was not able to eat anything but spuds and soft stuff. I told Dr. Gray nurse about the way I feel.

Q. Did they take any x-ray pictures and what did they find?

A. They took pictures and sent me to Swedish Hospital to take biopsy. To take out piece. They told me wife that I had cancer. After that I went every other day. Dr. Gray told me that having cancer I would have to pay for it myself. They give me two more weeks treatment. Dr. Gray sent me to Marine hospital to take another biopsy.

Q. Did you go to hospital?

A. I stay at Marine hospital for 3 weeks. Dr. Weber was there when biopsy was taken and found negative. It showed no cancer.

Q. Did you ever find that you had cancer?

A. No.

Q. Were you ever operated on for cancer?

A. Yes, at the Marine hospital.

(Deposition of Peter Lathourakis.)

Q. How many doctors said you had cancer?

A. Dr. Gray, Dr. Weber and Marine Hospital.

Q. What did they find after they operated on you? A. Flemadora.

Q. Did they find cancer? A. No.

Q. How long did this operation take?

A. 8 hours. They took off one rib all together.
I not able to feel anything there for 8 or 9 months.

Q. How much did you weigh before accident?

A. 190.

Q. How much now? A. 156.

Q. Can you gain weight? A. No.

Q. Why can't you gain weight?

A. I can't eat much good solid food and I can't sleep well. I can eat hamburgers and fish, however.

Q. Can you eat ordinary foods?

A. No. I can't get them down, they won't go down, something, I throw whole thing up. I have take medicine before meals and have to eat 5 or 6 times a day.

Q. How does it affect your walking?

A. I can only walk two or three blocks on level and only one block on hill.

Q. How is right arm?

A. Numb. It pain when I did little work around boat on doctor's orders.

Q. How about fingers?

A. I have very little grip in right hand now and two fingers are numb.

Q. How was your right hand before?

(Deposition of Peter Lathourakis.)

A. I was strong enough for two men.

Q. How much did you make in 1948?

A. \$2,500.00 from Libby for 15 days the fishing season.

Q. How many days did you put in to make that?

A. About month or month and half.

Q. Did you earn any money before you went fishing in 1948?

A. Working on my boat.

Q. What kind of boat is it?

A. 34 feet, square stern gillnetter.

Q. You fixed up that boat—how long did it take in 1948?

A. 4 months I took it out shipyard and finish.

Q. What was your time worth?

A. The shipyard asked \$25.00 a day for one man for 8 hours' work.

Q. I understand instead of pay \$25 a day to the shipyard for a man, you did the work yourself?

A. Yes.

Q. If you hadn't done this work, you could have worked for someone else?

A. I had offer to mend nets for Norby Supply Co. in Seattle.

Q. How much does Norby Supply Co. pay?

A. Not much, only about \$1.85 per hour.

Q. That took you 4 months. Did you work any before going fishing?

A. Worked for Nick Bez—fix nets—3 weeks pay \$1.87 per hour (\$180.00).

(Deposition of Peter Lathourakis.)

Q. Have you made up a statement showing how much you made in 1948?

A. I have best boat on Puget Sound, the other fishermen make from 3 to 5 thousand.

Q. How much could you make between August and December? A. About \$4,000.00.

Q. How much clear? A. About \$3,000.00.

Q. In 1947 how much did you make?

A. \$5,400.00.

Q. What kind of work can you do now?

A. I don't know. I don't think anyone even a good friend would hire me in the condition I'm in.

Q. Do you think you can do as much work as before?

A. I don't think I can do $\frac{1}{3}$ as much as before. I got no strength—no nothing.

Q. How is your breathing?

A. Not very good.

Q. How many children?

A. Two. One under 18 at time of accident.

Mr. Roden: That's all.

Direct Examination

By Mr. Robertson:

Q. Pete, your fishing partner Coulas asked you how you were immediately after the accident and you told him you were all right.

A. If a fellow is all bunged up, how can he tell what he say?

(Deposition of Peter Lathourakis.)

Q. Reads from record regarding statement of previous question.

A. Mebby yes, mebby no, it hard to remember.

Q. Who owned the boat in which you fished and where were you at the time of accident?

A. Libby owned boat. The place was known as Libbyville.

Q. Who owned power boat that was towing you?

A. Red Salmon Canning Co.

Q. The barge or scow was owned by?

A. I don't know—it was fish scow.

Q. Libbys paid you \$2,549.11, didn't they?

A. Yes, that's right.

Q. When did your employment commence under the union contract? A. June 26.

Q. What was expiration date of contract?

A. Probably 10 or 15 August.

Q. Libby paid you \$1,050.80 under A.W.C.A. as result of injury? A. Yes, that's right.

Q. Where was your operation performed?

A. Marine Hospital.

Q. You found at that time that your esophagus had thickened so that you could not eat?

A. Flamatory.

Q. Didn't you have chronic esophagitis?

A. ———.

Q. When did you last work on your boat?

A. I don't recall the last day, but I work January, February, March, April.

Q. Where's boat now?

(Deposition of Peter Lathourakis.)

A. Fisherman's dock, Seattle.

Q. Did you do anything to it this year?

A. Yes, a little painting inside and outside.

Q. When was this?

A. Just before I came down here—every other day.

Q. When did you use boat last for fall fishing?

A. November, 1947.

Q. You earned \$187.00 from Nick Bez and \$2,549.00 from Libby?

A. Yes.

Q. In fall of 1947 you earned \$1,500.00.

A. Yes, that is right.

Q. You say that you have been examined by doctor every year. Did they take any x-rays?

A. Yes. No, no x-ray.

Q. When was last time you vomited?

A. About two week ago.

Q. You can't even now eat things like big beef-steak, pork chop or the like?

A. No, not very well.

Q. Have you signed on with anyone to fish this season?

A. No.

Q. (By Mr. Roden): You made out a statement as to what money you could have earned in 1948?

A. Yes, I have.

Q. (By Mr. Roden): You put in about four months of work on your boat in which you made at \$2 per hour that way you made, earned or saved \$1,536.00.

A. Yes.

Q. (By Mr. Roden): Then you got \$180 from Nick Bez.

A. Yes.

(Deposition of Peter Lathourakis.)

Q. (By Mr. Roden): Then you got over \$2,500 from Libby, McNeill & Libby? A. Yes.

Q. (By Mr. Roden): Then you say that from August 20 to November 20 a period of 3 months you could have earned fishing on the Sound \$4,000 which would have cost you about \$1,000 expense.

A. That's right.

Q. (By Mr. Roden): What about fishing for dog livers. How much could you make?

A. About \$1,000.

Q. (By Mr. Roden): When do you fish for dogs? A. In fall after regular season.

Q. (By Mr. Roden): If those figures are true you could have made \$8,216.00 last year.

A. That's right.

Q. (By Mr. Roden): In 1947 how much from Libby? A. Over \$3,000 I think.

Q. (By Mr. Roden): How much before you went to cannery in 1947. How much money did you pay income tax on? A. \$4,500.00

Q. (By Mr. Roden): You earned additional money in 1947 which did not show in income tax because you did not get it until 1948?

A. That right—yes.

Q. (By Mr. Roden): That you got \$892.00 more during that year? A. Yes.

Q. (By Mr. Roden): Your earnings for 1947 was about \$5,300.00? A. Yes.

Q. (By Mr. Roden): Tell these gentlemen how much you earned in 1946.

(Deposition of Peter Lathourakis.)

A. That is hard to say, I don't—to lie about it.

Q. (By Mr. Roden): Did you make more in 1946 than in 1947? A. Yes.

Q. (By Mr. Roden): Has it been difficult to make that money while you were in good health?

A. No, no trouble at all.

Q. You were high boat in 1947? A. Yes.

Q. (My Mr. Roden): Were you high boat in 1946 too? A. Yes.

Q. (By Mr. Roden): Before you had this accident did you have any trouble about eating?

A. No. No.

Q. (By Mr. Roden): In 1948 after the canning season, did you know how much the boys who had a boat like you have made fall fishing?

A. Some made \$3,000, some made \$4,000 and some made \$5,000.

Q. (By Mr. Roden): Would you say that a reasonably good fisherman could make \$3,000 net in that time?

A. Yes. He could easily make that.

Q. (By Mr. Robertson): You got back to Seattle July 24? A. Yes.

Q. (By Mr. Robertson): Now I ask you again Pete, what did you actually earn working for someone else in 1948. The only amount was \$2,549.11 that Libby paid you and \$180.00 that Nick Bez paid you? A. Yes, that right.

Q. (By Mr. Robertson): How much would it cost you to fish for dog livers on which you claim you could make a thousand dollars?

(Deposition of Peter Lathourakis.)

A. About \$50. I burn diesel.

Q. (By Mr. Robertson): You don't fish for dog livers in the fall do you? A. Yes.

Q. (By Mr. Robertson): This \$1,500 shown on the statement, you didn't earn that did you, that is what you say it would have cost you to work on your own boat. That you hired yourself as shipwright wages or carpenter wages?

A. Yes, it would have cost \$1,800 to do same thing at shipyard.

Q. (By Mr. Robertson): I object to this exhibit as being a true statement of wages.

Q. (By Mr. Roden): You could have earned \$1,500 working for someone else couldn't you, in those four months? A. Yes.

Q. (By Mr. Roden): What kind of work could you have done in that time?

A. I could have work as rigger in shipyard.

Q. (By Mr. Roden): What is scale for rigger?

A. I don't exactly know—it's over \$2.00 hour.

Q. (By Mr. Benson): You were in the 1st World War you say? A. Yes.

Q. (By Mr. Benson): Did you have trouble with your stomach then? A. No, sir.

Q. (By Mr. Benson): Did you ever vomit in your life before? A. No, sir.

Q. (By Mr. Benson): You started vomiting as soon as you had the accident in Bristol Bay?

A. That's right.

Q. (By Mr. Benson): You say that you vomited up until 20 days ago.

(Deposition of Peter Lathourakis.)

A. That is right. Yes.

Q. (By Mr. Benson): You feel pretty good now though?

A. Well, I still feel pretty weak.

Q. (By Mr. Benson): You feel weak, but you feel pretty good and you can eat soft foods?

A. Yes, that right.

Q. (By Mr. Benson): Did you start vomiting immediately after the accident?

A. Yes, about one-half hour after the accident.

Q. (By Mr. Benson): You have never been to a doctor except for a physical examination?

A. Yes, that right.

Q. (By Mr. Benson): Are there any more questions to be asked of the witness?

That will be all, Mr. Lathourakis.

DEPOSITION OF FRED SHEILS

By Henry Roden:

Q. What is your name?

A. Fred Sheils.

Q. What is your business?

A. Supt. for Peninsula Packing Co.

Q. Are you acquainted with a man named Peter Lathourakis?

A. Yes, I've known him since 1943.

Q. What business has he been engaged in since you have known him?

A. Fishing.

(Deposition of Fred Sheils.)

Q. Have you ever been around where he fished himself?

A. Yes, at Ekuk Cannery Co., in 1943, 1944, 1945 and 1947.

Q. In reference to the year 1947 what did Lathourakis do?

A. He fished and was always the high boat man and was a very active man.

Q. What was his physical condition?

A. Very good.

Q. A strong powerful man? A. Yes.

Q. Did you know that he suffered an accident in 1948? A. Yes, I heard about that.

Q. Did you see him in 1949?

A. Yes, he was fishing for me this summer.

Q. Did you observe him during the season?

A. Yes. We live on same ship.

Q. Compare his physical condition of this season with other seasons prior to his accident.

A. Yes, I don't think that he was the same man he was a year ago.

Q. What was the difference?

A. This season he got tired after doing very little work.

Q. Did you observe whether he did his part of unloading the fish when he came to the delivery scows?

A. I had one of the deck hands help him as he could not lift his arms high enough to do it.

Q. He was supposed to do that himself?

(Deposition of Fred Sheils.)

A. Yes.

Q. Was he able to do equal work with his partner Coulas?

A. No, he was not. Coulas did two-thirds of all the work.

Mr. Roden: That's all.

R. E. Robertson:

Q. Mr. Sheils you were Supt. of cannery ship itself? A. Yes.

Q. Did you see Mr. Lathourakis during the day time?

A. Sometimes. I was on fishing grounds.

Q. How often did you see him fishing?

A. I couldn't say exactly. At least two or three times a week.

Q. Was he out in both good and bad weather fishing this year? A. Yes.

Q. How often did they unload at the floating cannery?

A. They unloaded at tenders instead.

Q. Were you out aboard the tenders?

A. Yes.

Q. How often did you see Coulas and Lathourakis boat fishing?

A. That would be hard to say.

Q. How often did you see them unload their fish at the tender? A. At least a couple of times.

Q. On these occasions you did not think that Lathourakis was doing his share?

A. No, I don't think he was.

(Deposition of Fred Sheils.)

Q. How far away were you?

A. Within a couple of feet.

Q. Did he work throughout the season?

A. Yes.

Attorney R. E. Robertson: That's all.

Commissioner Benson:

Q. From the work he was able to do this year would you employ him again next year?

A. That's hard to say. I took Pete on this year because he was a good friend of mine. However, I don't think he would get the same consideration from someone else. I didn't let him work after the season as fishermen are supposed to do to earn their run-money. Pete was all in so I told him to take it easy.

Q. You hired him as a fisherman because of personal relationship?

A. Not exactly. In other years he has always been high boat.

Mr. Robertson:

Q. Were they high boat this year?

A. No. They were 6th or 7th.

Q. How many boats did you have?

A. I had 21.

Mr. Roden:

Q. Pete was on top year after year wasn't he?

A. Oh, yes.

Mr. Roden: No further questions.

LETTER RE PETER LATHOURAKIS

May 20, 1949.

Roy E. Jackson, Attorney at Law,
American Building,
Seattle, Washington.

Re: Peter Lathourakis
Injured July 16, 1948

Dear Mr. Jackson:

Mr. Lathourakis came in this afternoon at your request for reexamination.

He is still about 26 pounds under his usual weight, due largely to shrinkage of muscle volume, and is unable to eat large enough meals to recuperate the loss. He has been trying to clean up his boat and do a little painting, and finds that he becomes very tired after two hours and has not been able to continue more than four hours, and that he has very little strength. The left chest wall becomes painful after an hour or so, and his right forearm cramps following work. He has experienced considerable abdominal and chest discomfort after meals, and is short of breath with effort, even walking a couple of blocks.

It would be more satisfactory to rate this man's disability after he has attempted fishing. At this time, it hardly appears that he will be able to develop the strength and endurance and eat enough food to enable him to do the work. At present, I would rate his disability as 65% of the maximum

for unspecified permanent partial disabilities for his chest and upper abdominal condition and general physical weakness, and 25% of the amputation value of the major upper extremity at the elbow on account of loss of strength, grip, and use of the forearm for work causing muscular cramps.

Very truly yours,

/s/ L. E. WILLIAMS.

Territory of Alaska
Alaska Industrial Board

No. 3889

PETER LATHOURAKIS,

Applicant,

vs.

LIBBY, McNEILL & LIBBY, a corporation,
Defendant.

DEPOSITION OF THORBURN S. MCGOWAN

(Called as a witness on behalf of the defendant.)

Pursuant to stipulation by and between the Applicant, by his attorney, Henry Roden, Esq., and the Defendant, by its attorney R. E. Robertson, Esq., the deposition of Dr. Thorburn S. McGowan, called as a witness on behalf of the defendant in the above-entitled matter, was taken on this 7th day

(Deposition of Thorburn S. McGowan.)

of July, 1949, at the hour of 11:00 o'clock a.m., at the Marine Hospital, Seattle, King County, Washington, before Ben F. Nelson, Notary Public in and for the State of Washington, residing at Suquamish;

The Plaintiff appearing by Roy E. Jackson, Esq., representing Henry Roden, Esq., attorney for the Applicant;

The Defendant appearing by Robert V. Holland, Esq., (of Messrs. Bogle, Bogle & Gates), representing R. E. Robertson, Esq., attorney for the Defendant.

(Thereupon, the following proceedings were had, and testimony given, to wit):

Mr. Holland: Let the record show that this deposition is being taken pursuant to the same stipulation previously referred to in this matter.

(It was stipulated by and between the parties through their respective representatives that all objections, except as to the form of the question, or the responsiveness of the answer, be reserved until the time of the hearing, and that the signature of the witness to his said deposition is waived, to which the witness himself assented.)

DR. THORBURN S. MCGOWAN

being first duly sworn as a witness on behalf of the Defendant, was examined, and testified as follows:

Direct Examination

By Mr. Holland:

Q. Will you please state your name?

A. Thorburn S. McGowan.

Q. And your occupation?

A. I am a surgeon.

Q. Are you presently employed?

A. I am employed by the United States Public Health Service as Chief of the Surgical Services in the Marine Hospital—the United States Marine Hospital.

Q. That is, at Seattle? A. Yes.

Q. How long have you been with the Public Health Service, Doctor?

A. I had one year with them in 1931, and I was in with them again since 1934.

Q. How long have you been in your present capacity at the Marine Hospital at Seattle?

A. I have been in the Marine Hospital for nine years, of which four were as Assistant Chief, and five as Chief.

Q. Prior to your coming to Seattle, you served with the Public Health Service elsewhere?

A. Yes, I have been doing the surgical Public Health Service since 1935, at various stations.

Q. How old are you, Doctor?

(Deposition of Thorburn S. McGowan.)

A. I am forty-two, sir.

Q. You graduated from what school?

A. From the University of Tennessee, sir.

Q. What year? A. 1932.

Q. Following your graduation there in 1932, will you tell us what specialized training or education you have had?

A. I had an interneship and a residency at the University Teaching Hospital at Memphis, which is now called the John Gaston Hospital, and following that I had training in surgery for the Public Health Service at Stapleton, which is a big hospital in New York.

Q. What type of work, if any particular work or type of work was followed during your residency?

A. I had training in general and orthopedic surgery.

Q. What did you follow at the Stapleton Hospital?

A. I have been in surgery since then in various capacities, first as assistant chief, and then as chief in one of the smaller hospitals, and then as surgeon at the United States Coast Guard Academy at New London, Connecticut; and then as surgeon at Manila, and then here as assistant chief. During the war I was assigned to the army for a period to build and activate one of the large hospitals in Alaska, and acted as chief surgeon there, and I returned here and became Chief of Surgery here in 1945.

(Deposition of Thorburn S. McGowan.)

Q. Will you state what professional organizations or societies you belong to?

A. I am certified by the American Board of Surgery. I belong to the American College of Surgeons. I am consultant in surgery at the University of Washington, and teach their students here, and operate a graduate training school in surgery which is recognized by the American Medical Association and the American College of Surgeons.

Q. Is the surgery which you teach at the University and in your graduate training school a general surgery?

A. It includes general surgery; orthopedic surgery and chest surgery.

Q. And you are duly and regularly licensed in the State of Washington?

A. I am licensed in the State of Tennessee, sir; not in the State of Washington.

Q. That is not necessary in the Public Health Service?

A. In the Public Health Service that is not necessary. I could apply for a reciprocal license if I care to, but I have not done it.

Q. Doctor, will you state what experience you have had, if any, with particular reference to chest surgery or surgery of the esophagus?

A. I have had approximately seven cases of esophageal surgery a year, and I have been doing these all that time I have been here. We have handled practically all of the various pathologic condi-

(Deposition of Thorburn S. McGowan.)

tions that have occurred in the esophagus. We see a large number of esophageal lesions for which no surgery is done, however.

Q. In this latter type of patient, is any diagnosis or observation made internally?

A. Oh, yes. I mean, we examine them and use the various studies, such as the use of barium or the passing of an esophagoscope or the other various procedures to make the diagnosis, and surgery is resorted to only in the instances where it is deemed advisable.

Q. Doctor, what area does this hospital serve in the Public Health Service?

A. This hospital covers the entire Northwest and Alaska.

Q. Now, Doctor, did you have occasion to observe or operate upon Peter Lathourakis?

A. Yes. May I refer to the records?

Q. Yes. You have for your use to refresh your memory the records pertaining to his case?

A. Yes.

Q. You may refer to them.

A. Mr. Lathourakis was in the hospital twice as an in-patient. The first time it was from September 6th to September 21, 1948, the second time from October 7 through November 2, 1948. He has been under observation as an out-patient at various intervals since that time.

Q. Doctor, by "in-patient" you mean a patient in the hospital?

(Deposition of Thorburn S. McGowan.)

A. Yes, in the hospital?

Q. And by "out-patient," you mean a patient reporting to the hospital from time to time?

A. Yes, for examination and treatment as indicated.

Q. Would you state then on what date you yourself first examined Mr. Lathourakis and what, if any, history he gave you at that time?

A. Yes, sir. The first date of the examination of Mr. Lathourakis was on the 6th of September. I believe that I saw him one day earlier, but I am not absolutely sure about that. At that time he stated that he was perfectly well until he had a crash injury to his chest and to his right arm when, while working on a small boat in Bristol Bay on July 16, 1948, he had a crash injury. After this, he was taken to the cannery or cannery tender, I don't know which, and at that time he was given stimulant—I think it was brandy—following which he vomited some yellow material. After this he noticed that he had difficulty swallowing solid food, and that he had pain in his epigastrium, in his chest, and in his arm. As I recall it, a cast was applied to the arm and he was sent down to Seattle where he saw his doctor, Doctor Bernard Gray. Due to his continued disability as far as the swallowing was concerned, Doctor Gray referred him to Doctor Julius Webber and Doctor Webber examined him with an esophaguscope. This was about the 10th of August.

(Deposition of Thorburn S. McGowan.)

It is my understanding that Doctotor Webber found a strictured area in the lower part of the esophagus, and took a piece of tissue for diagnosis. On pathological examination of the tissue, this was supposed to be a cancer, probably a very early one. He then had several X-ray studies in town, which showed a defect in this part of his esophagus, and because of this, since he was a seaman, Doctor Gray suggested that he enter the Marine Hospital for study and probable operation. At that time, when he entered the hospital, he said he was still unable to swallow meat.

Q. You have completed the history now?

A. The last thing, which I think I should say is, he was still unable to swallow meat, solid foods, and some liquids. He was slightly better at the time of his entrance than at the intervening time, and he was able to swallow any kind of liquids.

Q. Was that the extent of his complaint at the time you first examined him?

A. Yes, he was not complaining to any extent about his right arm at that time.

Q. Then, Doctor, would you state what diagnosis, if any, was made at that time and what was done for the man?

A. A tentative diagnosis of cancer of the lower esophagus was made, and, accordingly, the diagnostic tests were repeated. The X-ray examination showed an obstructive lesion at the junction of the middle lower third of the esophagus, which appeared

(Deposition of Thorburn S. McGowan.)

to be slightly less extensive than in the submitted films of 8/3/48. Barium passed readily through this area.

Q. Those films which you referred to, were they the ones taken previously in town?

A. Yes, they were; there were quite a number, and quite a number of our films with them.

Q. Would you just continue on any further diagnosis which you made?

A. An examination of the blood showed it to be within normal limits; the urine apparently was normal; the blood Kahn was normal; he had a normal range of proteins in his serum, and he had, on X-ray, some arthritis of his upper spine.

On September 15, an esophaguscopy was taken. The esophagoscope was passed down to a point about one and one-half inches below the aortic arch. That would be between two-thirds and three-quarters of the way down the esophagus. At this point the lining was reddened and showed swelling, and just at this point the size of the esophagus narrowed to the place where the instrument could not be passed further. At this point of stricture there was a bleeding, irregular area which extended about half way down the whole circumference. A piece of this area was removed to have it examined by the pathologist. The examination of this piece of tissue showed that there was chronic inflammation present, with some glandular areas which were hyperplastic.

(Deposition of Thorburn S. McGowan.)

Q. Would you explain what you mean by "hyperplastic"?

A. Well, when we say "hyperplastic," it means that the gland does not look entirely normal, but looks as though it had been growing rapidly and spreading out more than it normally would.

This was not, definitely, a cancer, however, on the section which was taken.

Q. Was that the report submitted by the pathologist?

A. Yes; that is what the pathologist said, sir. After we found this, we advised him to have an immediate operation, but he was reluctant to do this, and refused to have the operation at the time; and because of that he was discharged against medical advice.

Q. Would that be against your advice?

A. Yes, against the advice of the doctors here in the hospital. He agreed to return for examination every two weeks, however.

Q. Did he return, as requested?

A. He did not return regularly during that interval, but had the advice of Doctor Gray and several other private physicians who saw him between times, and I do not know all of the group who did see him. There was one Greek doctor, I think, whom he particularly placed confidence in, and because of that he came back to the hospital again on October 7 and entered the hospital willing to have an operation. In the meantime he had lost

(Deposition of Thorburn S. McGowan.)

further weight. He said that for a three-day period just prior to entering the hospital he was unable to swallow anything, and that this scared him and made him return.

Q. Would you state the course of treatment and/or operations on the second visit?

A. All right, sir. He was again re-examined and arrangements were made to have a blood transfusion. He was placed on penicillin by mouth, to cut down the amount of bacteria there normally present in the throat and in the esophagus, and on the night of October 10 he was prepared for operation in the usual fashion. You are not interested in all those details, are you?

Q. No, Doctor.

A. All right, sir. On October 11, he came to operation and at this time his chest was opened.

Q. Will you state, first, who performed the operation?

A. The operation was performed by me; by me with the assistance of Doctor Brockmeyer, Doctor Lawson and Doctor Metzmaker.

Q. Would you then describe the operation and the findings, Doctor?

A. Yes, sir. The chest was entered in the usual fashion by taking out—I will have to check to be sure which rib it was—we always X-ray them afterwards to be sure—I don't think that actual X-ray report is available here. It was probably the eighth rib. We usually remove the eighth rib, but some-

(Deposition of Thorburn S. McGowan.)

times we may differ. Yes, it says here it was the eighth rib which was removed, and the chest was opened up so that the lung could be pushed out of the area, and while the anesthetist had a tube into the trachea so that this lung could be collapsed but he could breathe through the passage.

Q. Is there a name for this operation?

A. Yes.

Q. Just what would you call it?

A. You would say that this would be an exploratory thoracotomy and an exploration of the mediastinum.

Q. All right, you may proceed.

A. When the lung was out of the way and the mediastinum was opened the esophagus was freed from its surrounding tissues, and at this time he was found to have a small but definite hital hernia of the short esophagus type. This hernia extended through the diaphragm approximately one inch and a half. Above this the esophagus was bound to all the surrounding tissues by an inflammatory reaction. This reaction extended upward to include the entire lower one-third and the lower portion of the middle one-third of the esophagus. The esophagus showed that its muscular wall was greatly thickened to a width of one centimeter. It was slightly irregular, and the entire inflammatory process extended over an area of about six inches. That is, roughly, correct.

Q. Doctor, is the presence of the inflammatory

(Deposition of Thorburn S. McGowan.)

process a normal or an abnormal condition?

A. That is a very abnormal condition, sir. Because of the inflammatory process present the esophagus was opened, and two specimens of tissue were sent to the pathologist for a frozen section. The frozen section again showed evidence of chronic inflammatory reaction, and the presence of these glands which were abnormal in their appearance. There was no evidence of a cancer in this section. To be sure that the part of the process was not cancer, two additional pieces of the esophagus were removed from different area and sent to the laboratory for section later.

Q. How is that?

A. For section, or, I should say, examination, later. Because of the great extent of the inflammatory process, and because, on opening the esophagus and looking up it the inflammatory reaction extended as far as could be seen, it was decided only to do a plastic procedure to enlarge the strictured area, that is, the constricted area. This was done by splitting the diaphragm and bringing the stomach up into the chest on that side, and putting the stomach up to the middle third of the esophagus and sewing the two together, so that there would be an adequate opening from the stomach into the esophagus. The diaphragm was then sewn to the side of the stomach, and the stomach was supported in its position by sewing it to the chest wall and to the vertebral column, and the lung was re-expanded and the chest was closed.

(Deposition of Thorburn S. McGowan.)

His recovery was a good one, with no infection following. It was slow, as is usual in such cases, because first a tube had to be left running through the esophagus into the stomach. He recovered to the point where he could have the tube removed, and be given solid food, which he could then swallow without difficulty. A check up X-ray examination was done on November 1st, to be sure that he could use the esophagus satisfactorily. This showed that he was able to swallow the barium without difficulty, and that the barium entered the stomach. It showed that the stomach was approximately half way above the diaphragm and into his chest.

Q. When was the next time he was seen by you after November 1st, Doctor?

A. He was seen at regular intervals until he was discharged from the hospital on November 2nd, and has been seen as an out-patient at various intervals from that time on.

Q. Doctor, did you personally see this man on the occasions of the various visits he made as an out-patient?

A. I have seen him on the majority of his visits, and have supervised the medication which he has been taking.

Q. What was his condition at the last time you saw him?

A. At the last time when he was seen, he was able to eat solid foods without difficulty. He had regained much of his strength and weight, but

(Deposition of Thorburn S. McGowan.)

stated he was not as strong as he had been before this difficulty. His blood count was satisfactory, and he was maintaining his nutrition and gradually gaining weight.

Q. Doctor, what would you say as to whether or not he had, at least at that time, any permanent disability from this operation?

A. I would estimate that there is some definite disability present. It is still too early to determine accurately how much disability is present, but whenever such an operation is done the man is not in as good condition as he was previous to this time. There is one other thing that I think should be said, and that is, because of the actual nature of his lesion in the esophagus, which is analogous to ulcer of the stomach, he may have further flare-ups in the future, which cannot be anticipated. He is being carried on a special diet, and in the use of certain medicines to prevent, if possible, any such occurrence.

Q. Doctor, will the diasability which the man had at the time you last saw him, decrease during the course of further convalescence?

A. We would expect it to decrease materially.

Q. Doctor, would you, without reference, unless necessary, to complicated medical terms, describe what is in front of the esophagus.

A. That is, starting from the skin in?

Q. Yes.

A. You have, first, the bony cage of the chest,

(Deposition of Thorburn S. McGowan.)

which completely protects the organism on the inside; next to this, in the center, is the space called the mediastinum, and directly below the breast bone is the heart.

Q. When you say "below," you mean under?

A. Yes, that is correct. In back of it, shall we say. In back of the breast bone is the heart; and just in back of the heart, on the upper part of the mediastinum, is the trachea, which then separates into the bronchial tubes for the lungs. Just in back of the trachea lies the esophagus. This is just in front of the vertebral column which supports the back.

Q. That is, the spine?

A. Yes, sir; that is the spine. In back of this are the powerful muscles which hold the spine erect at all times.

Q. Doctor, did you, in your exploratory thoracotomy observe any damage to the area immediately in front of the esophagus, that is, any of the items which are located in front of the esophagus?

A. None whatsoever.

Q. In your examination, was it possible to observe any condition like that, if it were present?

A. Yes. We have to push the heart aside to get to the esophagus; we see the lungs and all the intervening tissue, and the backbone, or spine in back.

Q. Doctor, from your observation of the esophagus when you opened the preliminary organs, did you then form any opinion as to whether the condi-

(Deposition of Thorburn S. McGowan.)

tion of the esophagus was one which commenced at the outer wall of the esophagus and went inward, or started from the inside of the esophagus and went outward?

A. Yes, sir; in my operative notes I think that is clearly brought out. It says: "When the esophagus was opened, the mucous and the submucous were found to be one centimeter thick in places noticeably scarred, with evidence of inflammatory process, which, however, appeared limited by the muscular coat." In other words, the muscular coat limited the process, so that it did not come from the outside in, but came from the inside out.

Q. Doctor, from the history which you obtained from the man on his original and subsequent visits, did he ever report to you any blow prior to the accident?

A. He initially said that he received a crush type of blow to both the right arm and the chest.

Q. Did he indicate any particular portion of the chest?

A. To my knowledge, he did not say what part of the chest, sir, but when he came to us he still had a little swelling of the right arm, but there was no evidence of any blow or bruise to the chest.

Q. Doctor, would you compare the blow to the right arm and the chest as to their respective recuperative values, under a blow of equal force?

A. I would say that one should recover as quickly as the other. In other words, I don't be-

(Deposition of Thorburn S. McGowan.)

lieve that the blow, so far as the initial blow was concerned, could have been any greater to the chest than it was to the forearm.

Q. Now, Doctor, the allegation in this case is that the man received, as stated by you, a blow to the chest, of such force which cannot, of course, be accurately noted or gauged, and I will ask you, from your education and experience if you formed an opinion at that time, or if you have any opinion now as to whether or not a blow of any force or intensity to the chest which would not injure any of the organs in front of the esophagus, could have resulted in the conditions which you found in the esophagus? A. I don't think so.

Q. Why?

A. For this reason: in the first place, my experience has been that any severe blow to the chest, if at all severe, should cause, first, a fracture of the ribs or the sternum; and he had no such fractures. In the second place, the esophagus is the most protected organ in the chest. It is in the center, surrounded by other organs, and by loose tissues which would take up any actual blow. It is not conceivable to me to have the esophagus directly injured by any external blow unless the blow penetrates the chest.

Q. Doctor, assuming the evidence to be, as indicated from your history, that this man vomited a certain amount following the accident. What would your opinion be as to whether or not that vomiting or regurgitation could cause the condition which you found in the esophagus?

(Deposition of Thorburn S. McGowan.)

A. I rather question that, because of this, that we see many people come in who vomit following accidents, many people who are drunk who vomit alcohol and alcholic contents following accident, and yet I have never had a similar case brought into the hospital, so that I feel that while vomiting might just temporarily for a matter of two or three days flare up in the condition that he had present, I am sure that this condition must have been present before; for two or three other reasons: in the first place, the thickness of the wall which we found at operation, some three months following his injury, could hardly have developed into such a condition if such a process had not been already present. In the second place, this man has a developmental anomaly. He has in his esophagus the same kind of glands that are normally present in the stomach; and this is the reason why he can get the equivalent of a stomach ulcer in his esophagus.

Q. Doctor, would the presence of these glands, in your opinion, being in the esophagus, rather than in the stomach, have been caused by a blow which we have described?

A. No, sir; those glands have been present to a certain degree from birth.

Q. I will ask you then, in your opinion, could the presence of the glands in the esophagus have been caused by the vomiting which was a part of the patient's history after the accident?

A. No, sir; the glands had been present congenitally.

(Deposition of Thorburn S. McGowan.)

Q. Doctor, in your opinion, were the findings, which you have described, upon the thoracotomy sufficiently explanatory of the condition of the stricture in the man's difficulty in swallowing food, as described to you?

A. Yes, sir; that is another reason why I don't feel that the blow in July, 1948, caused the condition. He definitely had a strictured condition, which was present even when he was first examined by Doctor Webber in August, and that is only one month, or less than a month, from the time he had the initial injury; and even in cases where people swallow caustics such as lye, a stricture rarely develops that rapidly—a complete stricture rarely develops that rapidly. So, obviously, you feel that he had had this for a considerable period of time. And the other thing is, the stricture develops because scar formation has to occur. The scar formation occurs slowly, and because of that you again feel that the process had been going on for a considerable period of time. The way it happens is this: you first get an ulcer, and the ulcer has to persist for a considerable period of time. The body tries to repair the ulcer, and a scar results; and then over a considerable period of time the scar contracts and you get what we call a stricture or a narrowing of the esophagus.

Q. Doctor, assuming that the man had never experienced any complaint such as difficulty in swal-

(Deposition of Thorburn S. McGowan.)

lowing prior to this accident, in your opinion, what sort of a blow to the chest wall would be necessary to aggravate the condition which you have indicated probably was there since birth?

A. I cannot see how any blow to the chest could aggravate such a condition directly. I had a case very similar to this approximately a year and a half ago, to illustrate this point, that is, the ulcer angle. I had a Swedish seaman who had an ulcer in his stomach, for which he had to have an operation. The operation was done in our New York hospital. He had had no difficulty at that time swallowing, but in approximately nine months when he came here he had difficulty in swallowing, and on examining him we found a similar condition in his esophagus, occupying the lower third. We did a similar operation for him, and he recovered, and is back on a Swedish boat as a seaman. That is to show you, when you have these glands there normally present in the stomach, in the lower third of the esophagus, you can get an ulcer there just as you can get an ulcer in the stomach.

Q. Doctor, will you waive the signing of the deposition after the reporter has typed it up?

A. Yes, sir.

Mr. Holland: That is all the questions I have.

(Deposition of Thorburn S. McGowan.)

Cross-Examination

By Mr. Jackson:

Q. Doctor, the first time you saw Mr. Lathourakis was September 6, 1948?

A. I think so; September 5 or 6. Doctor Gray called me about him, and he came up to see me as an out-patient; and then I had him admitted on the 6th. So it might have been one day before.

Q. That was approximately three months after the accident?

A. Yes; July, August and September, yes, sir.

Q. Now, did you go into any detail with him as to how the accident occurred?

Mr. Holland: With the doctor?

Mr. Jackson: Yes. With Mr. Lathourakis.

Q. (By Mr. Jackson): Did you talk with Mr. Lathourakis as to how he was standing and how the boat struck the barge?

A. No, I didn't. He merely told me he was on the boat when the barge struck the boat, or the boat struck the barge.

Q. Did he tell you he was standing at the bow of the boat at the time the boat struck the barge, and it was a matter of trying to save himself from being killed or drowned?

A. I understood he was afraid he might get thrown overboard, yes, sir. He said he was struck; he didn't say where.

Q. Did he tell you he was scared to death at the time?

A. Yes, he did, sir.

(Deposition of Thorburn S. McGowan.)

Q. And you doctors recognize fright?

A. Yes, we do.

Q. And, Doctor, did he tell you that he had a crash injury to the chest and to his right arm?

A. Yes.

Q. And did he tell you how his chest was struck, and just what his chest struck?

A. As I recall, a mast or spar, or something like that, sir.

Q. Did he tell you, immediately following that, he was in severe shock?

A. He said that he was struck, that he had to be taken off the boat to the cannery. He didn't say anything about shock at the time.

Q. Would you assume that he was in severe shock following such an accident?

A. I would assume that in all probability he was in shock, but how severe I would not know.

Q. Did he tell you he was numb from his throat down to the bottom of his stomach?

A. No, sir, I don't regard that as shock, sir. That is, I don't think that is one of the signs of shock.

Q. I asked you if he told you that?

A. No, sir, he did not.

Q. Would that be of any significance to you if he had told you that immediately following this accident he was numb from his throat down to the bottom of his stomach?

A. No, sir.

Q. That would have no significance?

(Deposition of Thorburn S. McGowan.)

A. I don't think it would have any significance in this case at all.

Q. Did he tell you he immediately vomited following the accident in the boat?

A. I understood he vomited; I don't know when, sir. But, as I recall it was after they gave him the brandy.

Q. Do you remember whether he told you he had vomited in the boat? A. I don't recall, no, sir.

Q. That, I suppose, would not have any significance?

A. I don't think that would affect the actual injury to the esophagus, unless there were other signs to go with it, because, in a number of folks, they get sick at their stomach after a harrowing experience; we see that quite often.

Q. He did tell you he was unable to swallow following this accident?

A. As I recall it, he stated being unable to swallow a day or so later. He was able, as I recall it, to swallow the brandy, or whatever they gave him. He swallowed that without difficulty. When he first noticed he could not swallow was when they were feeding him solid foods.

Q. Now, did you get any history from him to the effect that when he took this brandy he immediately vomited again?

A. He stated he vomited after he took it.

Q. Did he also tell you he tried to drink a cup of coffee after he came to the hospital, and he vomited again?

(Deposition of Thorburn S. McGowan.)

A. As I recall, he told me he vomited several times; and that is all I can tell you. I don't know what he drank the second time.

Q. Doctor, I would like to ask you this, if the fright that he had, that Mr. Lathourakis had at the time of this accident and the regurgitation and vomiting that followed—whether that would produce a spasm in the esophagus?

A. A temporary spasm, yes.

Q. And the spasm in the esophagus would impair his swallowing?

A. Temporarily, sir.

Q. Temporarily?

A. In other words, we see that every so often. We call it globus hystericus. We see people who have an experience like that, and they say they cannot swallow because they get a lump in their throat; and that practically always is temporary.

Q. In this case, did Mr. Lathourakis tell you that he had this difficulty in swallowing immediately after or shortly following this accident, and that he has had it ever since the accident down to the time that he came to see you in September; is that correct?

A. Yes, more or less. It was worse sometimes than it was at others.

Q. Now, Doctor, I would like to ask you if such a blow, such an accident as Mr. Lathourakis had, would produce a compression of the upper abdomen?

(Deposition of Thorburn S. McGowan.)

A. I don't know, sir. I don't see that striking the chest would cause the upper abdomen to be compressed particularly, sir.

Q. Now, assuming the upper abdomen was compressed, would that squeeze the gastric contents from the stomach into the esophagus?

A. Not necessarily.

Q. I asked you if it could, if he had compression of the chest or the upper abdomen? Would that cause the contents of the stomach to be squeezed into the esophagus?

A. Only under certain circumstances, sir. Normally there is what we call a muscle accumulation at the junction between the esophagus and the stomach, and normally that holds; if you compress it hard enough, you could certainly do it, but I would think it would take quite a severe pressure.

Q. But it can happen?

A. I would imagine it is possible to happen, sir, yes.

Q. Now, Doctor, this thickening of the wall of the esophagus that you spoke of, how far is that, in inches, from the opening into the stomach where the esophagus opens into the stomach?

A. It started approximately at the point where it opens into the stomach and extended upwards, roughly, for at least, let me see, eight or nine inches.

Q. Now, Doctor, assuming you have a compression of the chest which would squeeze the gastric

(Deposition of Thorburn S. McGowan.)

contents of the stomach into the esophagus, would such a procedure, squeezing the gastric contents of the stomach into the esophagus, have produced an overstrain on the esophagus?

A. Just a moment. I don't think you meant what you said. Let me tell you what you said.

Q. All right.

A. You said that, assuming a compression to the chest.

Q. Of the upper abdomen, I mean.

A. That is what I meant; you did not state that.

Q. I mean the upper abdomen.

A. Would you then give me the question again?

Q. All right. Assuming that we have in this case, assuming that in this accident Mr. Lathourakis had a compression of the upper abdomen which would squeeze the contents of the stomach into the esophagus, would such a happening or occurrence produce a strain upon the esophagus?

A. Not any more than when you vomit, normally, because you then force the contents of the stomach up, just from the contraction of the stomach itself, and you bring it all the way up; and people vomit many times and nothing happens, the difference being in Mr. Lathourakis' case, that he has something that most of us probably do not have, glands that are exactly like the stomach glands, which are making gastric juice in his esophagus rather than making the gastric juice in the stomach, don't you see?

(Deposition of Thorburn S. McGowan.)

Q. Assuming that we have a compression of the upper abdomen following an accident such as Mr. Lathourakis had, and this forced the gastric contents from the stomach into the esophagus, and you had a narrow esophagus at that particular point. Wouldn't such a happening aggravate this abnormal condition that you spoke of, that has existed in the lower end of the esophagus?

A. Only temporarily, sir.

Q. But it would aggravate it?

A. I think to a certain extent, for a matter of a day or so, yes.

Q. Now, Doctor, if that condition was aggravated temporarily, and that same aggravation continued for months following the accident, would you say then that there was just a temporary aggravation of that condition?

A. You are giving me a hypothetical question to start with, and then you are changing it, so it is difficult to answer. In other words, you say if it was a temporary aggravation that continued, and would I then say it was a temporary condition. He had apparently one blow, and that is all, and that is a temporary thing and is a limited thing. That is why I say it might have aggravated the condition for a matter of twenty-four to thirty-six hours, but it would not have aggravated it from that time on.

Q. Assuming you have an aggravation of that kind, what would you expect to observe in the esophagus at that point?

(Deposition of Thorburn S. McGowan.)

A. In Mr. Lathourakis' esophagus?

Q. Produced during this period of aggravation; what would you expect to find?

A. At that time I would expect to find that the lining was more swollen than usual; I would expect to find it might be a little redder than usual, although I think that Mr. Lathourakis would at that time already have shown ulcers present from the abnormal glands present there, and I don't think the forcing of the contents up temporarily would make much difference, for this reason: because the same contents that is being forced up is being manufactured by the glands that he has there, don't you see, twenty-four hours a day.

Q. Would you expect to find a swelling and a redness? A. Yes.

Q. I think you have spoken of esophagitis?

A. That is an inflammatory affair; that is an inflammatory affair in the lining of the esophagus.

Q. Would you expect to find mesophagitis following such an accident?

A. If he had a normal esophagus, you would expect to find a temporary, acute flare-up, but not the chronic condition that we found in his case, sir.

Q. Now, if you superimpose the fact of the abnormal esophagus a further strain—a further strain upon the already weakened wall in the esophagus, then you would have a worse condition than would have been produced otherwise; isn't that true?

(Deposition of Thorburn S. McGowan.)

A. I don't believe so, sir. For instance, you say, "a strain upon the already weakened wall in the esophagus." I don't think the wall was weakened at all. The wall was contracting down; it was cutting down; it was thicker than usual, but it was not a weakened wall.

Q. Then you did have an abnormal wall?

A. Yes, certainly, it was an abnormal wall.

Q. So it would take a greater force to push the contents out of the upper abdomen from this blow.

Mr. Holland: Assuming the pressure was on the upper abdomen.

Mr. Jackson: Yes, of course.

The Witness: In other words, you are giving me a hypothetical case.

Mr. Jackson: Predicated on the evidence in this case that he had a crushing blow to his chest.

The Witness: I disagree with you there. You speak in one case of a blow to the upper abdomen and then you change it to the chest. You have given me hypothetical questions now relating to the upper abdomen. I have been trying to answer the questions that you have given me, but you are now changing it.

Q. (By Mr. Jackson): Can you say that a crushing blow such as Mr. Lathourakis had to his chest did not compress his upper abdomen? Can you say that?

A. I feel, if it had, he should have had some evidence of injury there, which apparently no one has found.

(Deposition of Thorburn S. McGowan.)

Q. What evidence would you find?

A. I think you should find bruising of the upper abdomen. You might find a scratch, if it had been abraded; I think you would be expected to find it very sore; and his complaint to the doctors and to me was about his chest, and he didn't complain of his abdomen hurting.

Q. Did he tell you that he was black and blue in the chest and in the arm?

A. He said his chest was discolored, and that his arm was discolored.

Q. Do you recognize, Doctor, ruptures of the esophagus?

A. I have seen only one actual rupture of the esophagus.

Q. That is all you have seen?

A. Yes, sir; they are very infrequent, sir.

Q. Do you recognize that a rupture of the esophagus can occur as a result of a blow to the chest which causes a compression of the upper abdomen?

A. I would not feel that any rupture of the esophagus would occur unless you had a most severe blow which would cause associated fractures of the ribs, and other things.

Q. That is what you feel? A. Yes.

Q. Are you familiar with a work entitled "Trauma in Internal Diseases," prepared by Doctor Rudolph A. Stern, Assistant Attending Physician, City Hospital, New York City, which was prepared during the year 1945?

(Deposition of Thorburn S. McGowan.)

A. I do not happen to know that, sir.

Q. I would like to ask you this question, or read this to you, and ask you if you will agree to this: "Injury to the esophagus. Traumatic rupture of the esophagus has been observed by many authors. In such cases a severe compression of the upper abdomen squeezes the gastric contents into the esophagus, which is over strained and ruptured." Would you agree with that, Doctor?

A. I think you would have to have a tremendous force, sir, but I am sure it could happen if you had put on enough force.

Q. Then a lot depends on the extent of the blow that you have to the chest and upper abdomen?

A. I disagree with you there. You are talking about the upper abdomen. A blow to the chest, I don't believe, will rupture the esophagus. I don't think it will rupture the esophagus until it has broken many ribs, and until it has very probably ruptured other organs. Actually you will find you get punctured lungs, and that you would get damage to other organs before you would get damage to the esophagus.

Mr. Holland: I would like to make objection to this line of questioning for the record in which counsel alternates between the terms "upper abdomen" and "chest."

Mr. Jackson: I was speaking of a blow to the abdomen.

(Deposition of Thorburn S. McGowan.)

Mr. Holland: That is assuming something that is not in evidence.

Q. (By Mr. Jackson): Do I understand that you take the position that Mr. Lathourakis did not have a blow following this accident to the upper abdomen?

A. In my opinion, sir. The history which he gives to some five or six various people here in no place refers to a blow to the upper abdomen. He told me personally that he struck his chest and right arm. I don't know anything about a blow to his upper abdomen, because he has never complained to me about it.

Q. Doctor, will you tell me where the upper abdomen is? What part of the anatomy is the upper abdomen?

A. As the usual thing, the upper abdomen is referred to as the space between the umbilicus, or belly-button, and the chest cage, as the margins of the chest.

Mr. Holland: Which margins, Doctor?

The Witness: The rib margins, as they swing down on either side; but that is a rather loose term, and when people refer to the upper abdomen, they usually mean as far down as the bladder.

Q. (By Mr. Jackson): When you speak of the chest and upper abdomen, they are right close together? A. Yes, they are, sir.

Q. If you were struck a severe blow, if you were up against a mast and your boat hit a barge,

(Deposition of Thorburn S. McGowan.)

and if you struck the mast with your chest, your abdomen would be involved, would it not?

A. Not necessarily. I don't know, exactly, sir.

Mr. Holland: I object to the question. The doctor is not qualified as a longshoreman or as a sailor, sufficient to know where a mast would strike.

Q. (By Mr. Jackson): What is a cardiospasm?

A. A cardiospasm is a complex thing, which has several different definitions. It refers, usually, to spasms of the muscle at the junction between the stomach and the esophagus, sir. It is a symptom complex, because people feel that it can be produced by one or two or three different things, sir.

Q. Doctor, have you had occasions to observe cardiospasm following injuries to the chest and upper abdomen?

A. I have operated on about seven or eight such cases in the last five years, sir, and I don't recall any of them coming as a result of an injury. Now, there is another technical term that we use for the condition that I am talking about, and that is "achalasia," and under that situation, you might say that is what we might call a chronic cardiospasm, and it gives usually a very characteristic picture in which the lower end of the esophagus balloons out because of the difficulty of the food passing through this junction between the esophagus and the stomach, and finally the lower part of the esophagus gets dilated and often as big around as your arm, and the muscle fibre at the junction be-

(Deposition of Thorburn S. McGowan.)

tween the stomach and the esophagus gets thickened, and under those circumstances we usually operate on them, although we first try to force a dilation. That is an entirely different condition than we found in Mr. Lathourakis' case. The stricture there is in a different place, and it really has no connection with the thing that we found on Mr. Lathourakis. I will be glad to tell you anything more about it, if you want.

Q. You admit this, Doctor, that fright, such as Mr. Lathourakis experienced, could produce a spasm in the esophagus which would prevent swallowing? A. Yes, temporarily.

Q. And you also admit this, that vomiting—that fright together with vomiting would produce a spasm in the esophagus?

A. A temporary one, yes, sir.

Q. And then, Doctor, when Mr. Lathourakis gave you the history in this case, saying that he had never experienced any difficulty in his life prior to this accident with swallowing, did you believe him?

A. I imagine that is probably the way he felt about it, and that is what you say; it is probably true that is the way he felt about it.

Q. Did you have any reason to disbelieve him at any time?

A. I did not disbelieve him. I have found that often patients have things that are present that they are not aware of until the thing is brought to their attention.

(Deposition of Thorburn S. McGowan.)

Q. Doctor, I would like to ask you this: in your opinion, did Mr. Lathourakis have a spasm in the esophagus following this fright and the vomiting after this accident, which prevented swallowing?

A. I think he undoubtedly had a temporary spasm, sir.

Q. And would it be your opinion that the inability to swallow was caused by a spasm in the esophagus following this accident at least for a period of twenty-four to thirty-six hours?

A. Yes, sir; I think that is reasonable, sir.

Q. You have the history in this case. Let me put it this way: such a spasm would aggravate the condition that existed in the esophagus for at least twenty-four to thirty-six hours?

A. Yes, I think that would be reasonable. Not the spasm, sir, but the possibility of the regurgitated extraction of gastric juice; I think any aggravation would come from the regurgitated gastric juice rather than the spasm.

Q. And fright does not have any effect upon gastric juice, severe fright?

A. I don't believe you are going to have any permanent change in gastric juice from fright.

Q. But temporarily?

A. I think temporarily it might have had some slight effect, but I don't think it would have a great effect. In other words, I think the vomiting is a greater factor than fright. In other words, I think fright is a minor factor.

(Deposition of Thorburn S. McGowan.)

Q. But the vomiting is a factor in aggravating the condition?

A. It is the biggest factor that causes temporary aggravation.

Q. You think the temporary aggravation would not last over thirty-six hours?

A. In a normal person, it would not.

Q. I am speaking now of the aggravation in this case, superimposed upon the condition that Mr. Lathourakis had; you think the aggravation in his case would last more than thirty-six hours?

A. No, sir; because his glands in the esophagus all the time are producing the same gastric juice as the stuff that is coming from the stomach.

Q. You have never seen a case of an accident such as Mr. Lathourakis had, superimposed upon this condition, have you?

A. No, sir; I certainly have not. I have seen a case similar to his, which I described to you, in another seaman, and I described it to you, where this man had an ulcer, just as he had, because he had ulcers like the glands in the stomach, in the wrong place.

Q. Do you recognize, Doctor, that you physicians, taking the same history as we have in this case, would disagree as to whether or not this accident such as Mr. Lathourakis had would either produce or aggravate conditions such as Mr. Lathourakis had in the esophagus?

Mr. Holland: That is argumentative.

(Deposition of Thorburn S. McGowan.)

A. I think the more experience men have with lesions of the esophagus, the less question there would be and the less disagreement there would be.

Q. (By Mr. Jackson): Let me ask you if you doctors do not disagree?

A. Well, sir, I can only say this: that Doctor Blackman who saw Mr. Lathourakis with me—this is hearsay, because I did not see his report. If it is true, it is true on the basis of what you have told me. I have not been told directly. I do not question it now, because of what you are telling me. As I recall it, he was examined by Doctor Pinkham. He went over the case and the slides here, and I believe, although I am not absolutely sure, I think that he agreed with what I said about it at the time; but I don't know whether he did or not, because he did not give me the report.

Q. As a matter of fact, Doctor Pinkham stated that he could not say that the accident did not aggravate the condition.

Mr. Holland: The doctor stated he has not seen his report.

A. If you say that he did that, that may be what he did. He was talking to me when we were going over the slides, and in doing that he said he felt that he thought we were right in what we thought. However, I have not seen these other reports, Mr. Jackson.

Mr. Jackson: I think that is all.

(Deposition of Thorburn S. McGowan.)

Redirect Examination

By Mr. Holland:

Q. I have just a few questions further, Doctor. Would the type of spasm caused by fright in a situation as described by Mr. Jackson, cause temporary impairment of a normal esophagus?

A. Yes, I think it could do that.

Q. And, Doctor, would a regurgitation and vomiting following an accident of this type aggravate temporarily, by reason of the fact that stomach acids and juices would be forced upward, a normal esophagus? Would that aggravate a normal esophagus? A. Yes.

Q. Doctor, what bony structure, if any, is in front of the upper abdomen?

Mr. Jackson: I think he has already answered that. There is no bony structure.

A. There is no bony structure in front of the abdomen; there is a bony structure in front of the chest. However, you might say, on either side the bony structure curves down and guards the upper abdomen, but there is no bony structure that lies directly in front of it, sir.

Q. Doctor, did Mr. Lathourakis at any time in his conferences with you in giving his history, indicate manually to you the area where he claimed he was struck on the chest?

A. He used his hands, stating that he was struck here (indicating); that is all I can tell you, because Mr. Lathourakis does not use English as fluently

(Deposition of Thorburn S. McGowan.)

as you or most of us do, and he patted his chest with his hands like this (indicating).

Q. He indicated it with his hands?

A. Yes, he said it was his chest here (indicating).

Q. And your observation of the spot that he indicated was that it was his chest?

A. It was definitely his chest. I knew nothing about any blow that he may have had to his abdomen, and, according to the records—I might check again. I just went through them. I don't think that any of the three or four doctors said so. In the first record it says "chest and arm"; in this record it says "chest and arm"; in this next record, apparently, it says that he gave no history except an interim report, and that had nothing to do with either the chest or arm, either, sir.

Q. Doctor, are those reports that you have there various reports prepared by other doctors in the hospital than you?

A. Yes; that covers approximately three other doctors than I who have recorded that, and in every instance it is recorded as "chest and arm."

Mr. Holland: I have no further questions.

Recross-Examination

By Mr. Jackson:

Q. I have a couple of questions I want to clear up.

A. (Interposing): Would you just let me look here for a moment to see whether there is anything

(Deposition of Thorburn S. McGowan.)

about his abdomen? No, sir, there is no record of anything in here of anything except the chest and arm.

Q. I would like to ask you, Doctor, this question: Mr. Lathourakis at the present time has lost the use of the eighth rib? A. Yes, sir.

Q. On which side?

A. Just a second. Suppose I get the X-ray and settle it for you. Would you mind if I did that?

Q. I don't know whether it is necessary.

A. I think it is the left; yes, it is on the left side.

Q. And is his lung that you collapsed in the same position, or has that been moved?

A. No, sir; the lung is in the same position.

Q. The stomach is out of position?

A. The stomach is about half way up into the chest, sir.

Q. And that is sewed on to what?

A. It is sewed on to the tissues around the backbone.

Q. It is sewed on to the tissues around the backbone?

A. That is the best way to describe it, I think, so that you will understand it.

Q. He has complained of shortness of breath?

A. Yes, sir.

Q. What would the shortness of breath be due to?

A. That would be due to a number of things; I couldn't tell you all of them. I could go over them,

(Deposition of Thorburn S. McGowan.)

but I would say that you could expect some shortness of breath from the operation, bringing the stomach up into the chest.

Q. And when you move the stomach up into the chest, doesn't that move the lung out of place?

A. The lung is elastic, and the lung occupies the remaining space. The X-ray shows his lung has completely re-expanded and occupied the remaining space. Obviously, when you bring the stomach up, there is some diminution in space, and I would estimate that he lost about one-thirtieth of his total available space inside the chest.

Q. And didn't one of those reports say there was some lack of excursion?

A. Well, I believe you might find by reading more closely, that would probably be the diaphragm and not the lung, because you are not able to catch the movement of the lung as well as you can the diaphragm, because the lung fills up the space that is available therein; you can actually see the diaphragm move but you cannot actually see the lung move as well.

Q. You spoke of finding a hernia?

A. Yes.

Q. Was that hernia of recent origin?

A. No, sir. That I could tell. If I refer to my notes, I can tell you definitely. That was referred to as a hernia of the short esophagus type, which is usually thought to be congenital, although it might not be. There is a little dispute among the doctors

(Deposition of Thorburn S. McGowan.)

about that now, but, at any rate, it is a hernia of long standing and has nothing to do with any recent occurrence.

Q. Was that hernia repaired? A. Yes, sir.

Q. The hernia at that time, was it producing any trouble?

A. I don't think it was, sir. It is common to find in many individuals hernias which have no symptoms. It was a very small one. I mean I would regard it as an incidental finding.

Mr. Jackson: I think that is all.

Redirect Examination

By Mr. Holland:

Q. Doctor, when Mr. Lathourakis has completely convalesced, if he had not at the time you saw him, would you give any opinion as to any permanent disability which would remain to him?

A. Yes, sir. I think Mr. Lathourakis will have a definite partial disability which will include an inability to do certain types, or, rather, to eat certain types of food which may produce more gas than usual, and the possibility that he may develop further ulcerations of any abnormal glands which he has.

Q. In terms of a man being able to work, could you give us any percentage?

A. I would rate Mr. Lathourakis at the present time, or, excuse me, at the time of his complete con-

(Deposition of Thorburn S. McGowan.)

valescence as being between twenty and thirty per cent disabled.

Mr. Holland: I have no further questions.

Recross-Examination

By Mr. Jackson:

Q. How much was he disabled when you saw him last?

A. At the present time I could not tell you, but I could get it from the records, if you would be interested, sir.

Q. You do not know at the present time?

A. At the present time, sir, I have not seen him for, I think, at least a month; so I could not tell you what his disability is.

Q. But you would assume that it would be more than twenty or thirty per cent? A. Yes.

Q. Around thirty to forty?

A. I would assume it would be around forty per cent.

Mr. Jackson: That is all.

Mr. Holland: That is all.

(Witness excused.)

(Deposition concluded.)

Certificate

State of Washington,
County of King—ss.

I Hereby Certify that on the 7th day of July,

1949, before me, Ben F. Nelson, a notary public in and for the State of Washington, at the Marine Hospital, Seattle, King County, Washington, personally appeared pursuant to stipulation between the parties, beginning at the hour of 11:00 o'clock a.m., Doctor Thorburn S. McGowan, called as a witness on behalf of the defendant in the above-entitled matter; and

Roy E. Jackson, Esq., appearing on behalf of the applicant, represented by Henry Roden, Esq., his attorney.

Robert V. Holland, Esq. (of Messrs. Bogle, Bogle and Gates), appearing on behalf of the defendant, representing R. E. Robertson, Esq., its attorney.

The above-named witness, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing transcript of deposition set out.

I Further Certify that the said deposition has been reduced to typewriting under my personal direction, by a competent person, and that the deposition is a correct transcript of the testimony as given by the witness, and that the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Board, as required by law.

I Further Certify that the reading over by or to the said witness of the said deposition, and the transcription of the said witness to his said deposition, were by the parties hereto, and the witness himself, expressly waived.

I Further Certify that I am not of counsel or attorney to either or any of the parties, nor am I interested in the event of the cause.

Witness my hand and official seal at Seattle, Washington, this 11th day of July, 1949.

/s/ BEN F. NELSON,
Notary Public in and for the State of Washington,
Residing at Suquamish.

DEPOSITION OF DR. A. BERNARD GRAY

Called as a witness on behalf of the defendant.

Pursuant to stipulation by and between the Applicant, by his Attorney, Henry Roden, Esq., and the Defendant, by its attorney, R. E. Robertson, Esq., the deposition of Dr. A. Bernard Gray, called as a witness on behalf of the Defendant in the above-entitled matter, was taken on this 22nd day of June, 1949, at the hour of 1:00 o'clock, p.m., at 602 Central Building, Seattle, King County, Washington, before E. E. Lescher, Notary Public in and for the State of Washington, residing at Seattle;

The Plaintiff appearing by Roy E. Jackson, Esq., representing Henry Roden, Esq., attorney for the Applicant;

The Defendant appearing by Robert V. Holland, Esq. (of Messrs. Bogle, Bogle & Gates), representing R. E. Robertson, Esq., attorney for the Defendant.

Thereupon, the following proceedings were had, and testimony given, to wit:

Mr. Holland: Let the record show that this deposition is being taken pursuant to written stipulation dated May 27, 1949, at Juneau, Alaska, signed by Mr. Henry Roden, Esq., Attorney for Applicant, represented here by Roy E. Jackson, and signed by R. E. Robertson, Esq., attorney for the Defendant, represented here by R. V. Holland, of the firm of Messrs. Bogle, Bogle and Gates.

(It was stipulated by and between the parties through their respective representatives that all objections, except as to the form of the question, or the responsiveness of the answer be reserved until the time of the hearings, and that the signature of the witness to his said deposition is waived, to which the witness himself assented.)

DR. A. BERNARD GRAY

being first duly sworn as a witness on behalf of the defendant, was examined, and testified as follows:

Direct Examination

By Mr. Holland:

Q. Will you please state your name?

A. A. Bernard Gray.

Q. Where do you practice, Doctor?

A. In the Stimson Building, Seattle.

Q. What type of practice do you follow, if any?

A. Orthopedic and Traumatic Surgery.

Q. When did you graduate from Medical School,
Doctor? A. In 1935.

(Deposition of Dr. A. Bernard Gray.)

Q. What school?

A. The University of Manitoba.

Q. What degree did you obtain at that time?

A. M. D.

Q. Have you had any medical training since that time at any institutions?

A. Yes. I was intern at the Winnipeg General Hospital. I was a resident at Deer Lodge, at Winnipeg, and at the Sea View Hospital in New York. I was attending Orthopedic Surgeon for three years at the Permanente Foundation Hospital at Oakland, California. I have been practicing my specialty in Seattle since 1945.

Q. Just briefly what were your duties at the Permanente Hospital in California, Doctor?

A. I was in the charge of the section handling fractures and injuries.

Q. Did you have a staff under you at that hospital?

A. Yes.

Q. Of what did your staff consist?

A. Assistants in the clinic, and in the wards, and in the emergency room, and also in the first aid stations in the shipyards. This hospital was established to look after 100,000 workers that worked at the Kaiser Shipyards in Northern California.

Q. How many beds in the hospital?

A. We had two hospitals, totaling approximately 400 beds.

Q. Have you had occasion to treat or examine Peter Lathourakis?

(Deposition of Dr. A. Bernard Gray.)

A. I first saw Mr. Lathourakis on July 26, 1948. He said that he was injured on July 16, 1948, when his right hand and forearm were caught between a mast and a barge. His forearm became very painful, and swollen, and discolored.

This occurred while he was fishing adjacent to the Libbyville Cannery in Alaska.

He was treated at the Koggiung Cannery the next day, where the cast was applied, and after four days he was sent back to Seattle, arriving on July 24, 1948.

His past history was normal.

Q. Just a minute. What history did you obtain from Mr. Lathourakis?

A. This is the history that he gave me. He also stated at the end of the examination, when I was reviewing the symptoms, that he was struck over the chest by the mast at the time of the injury. Since then he has had no pain, but has had difficulty swallowing heavy foods, especially meat.

Q. Did you make an examination of the man after that time, Doctor? A. Yes, I did.

Q. And what did that examination reveal, if anything?

A. Yes, I made an examination and took X-rays and ordered X-rays and treatment. The right arm was encased in a short plastic cast. X-rays taken through the cast revealed no evidence of fracture, so the cast was removed and the X-rays revealed that the bones of the forearm were intact.

I noted that the forearm was extensively swollen,

(Deposition of Dr. A. Bernard Gray.)

the circumference measuring two inches greater than the opposite forearm.

There were many areas of healing abrasions, and there was a patchy discoloration.

The swelling extended from the fingers to above the elbow.

Tenderness was extensive, which was present throughout, and it was marked. There was about 50% limitation of the motion of the fingers and wrist joint motion. There was muscle weakness.

Q. Doctor, did you observe at that time any contusion or swelling of any type on the chest of the individual?

A. No. I examined his chest wall and there was no discoloration, and there was no local tenderness.

Q. Did you make any diagnosis at that time, Doctor?

A. Yes, I made a diagnosis of extensive contusions and soft tissue hemorrhage of the right forearm of the hand.

Q. Did you give the man any treatment at that time, or following the time of your examination?

A. Yes. I applied an elastic bandage to the area, and I advised him to start using hot soaks at home and start mild massage and exercises.

I also felt that the complaint of inability to swallow meat should be investigated further, and felt that X-ray studies should be made of his esophagus.

Q. When was that complaint made, Doctor, with reference to your first examination of this man?

(Deposition of Dr. A. Bernard Gray.)

Mr. Jackson: He said that it was after the time of his examination of the arm.

Q. (By Mr. Holland): Was that made at the same time as your first examination?

A. At approximately the same time. As a matter of fact, I do not think that it was made on the same date, because after I had written my report and I was ready to sign it he came in on the second day and he told me about this, and I finished my examination.

Q. Would you describe then the course of treatment, if any, you gave to the man, and his progressive condition.

A. Yes. We had X-ray studies made of the esophagus. They revealed an organical lesion, which had the appearance of carcinoma.

I referred the patient to Dr. Julius Webber, who passed a tube down the esophagus and found an organic lesion of the walls of the esophagus.

A biopsy was taken, and the pathological diagnosis at that time was "a developmental anomaly with a question of an early adeno-carcinoma arriving in the cardiac glands of the esophagus."

I continued with the treatment of the forearm, and he improved rapidly so that by August 20 there were only residual swelling and tenderness, and there was a good range of motion of the finger joints but the grasping power of the hand was still somewhat weak.

I recommended further treatment and felt that

(Deposition of Dr. A. Bernard Gray.)

he would probably be through with the forearm by about the first of October.

Because of the clinical X-ray findings I felt that it was imperative that this man have a surgical treatment to the esophagus. I suggested that he be referred to a specialist along these lines, and finally it was arranged that he should go to the Marine Hospital.

I probably saw him a few times after that, and I didn't see him again until he came into the office months later, stating that he had been to the Marine Hospital, and he had had intensive investigation. He had a surgical procedure done, which apparently was giving him relief of the difficulty of swallowing.

Q. Doctor, did you at any time form any conclusions to the difficulty which this man was encountering with his esophagus.

A. Originally I felt that a reasonable diagnosis was carcinoma of the esophagus, and therefore it was unrelated to any injury, and that is why I recommended immediate medical care, but I had to advise that the condition was unrelated to the injury, and suggested to the man that he would have to seek care on his own.

At a later date I had an opportunity to review the findings that were made.

Q. Did you form any conclusion from your own examination of the man and from your review of any findings made?

A. Yes. After reviewing all of the findings in

(Deposition of Dr. A. Bernard Gray.)

this case and reading the opinions of a pathologist who examined him, and surgeon who treated him, I came to the conclusion that this man had a pre-existing condition in his esophagus of a congenital nature, whereby he had stomach glands present in the esophagus. These stomach glands produced acid, which the linings of the esophagus is not prepared to handle, and this is an accepted cause of inflammation of the esophagus.

I came to the opinion that the trauma of the chest had apparently no direct relationship to this injury.

This opinion is not based on any great experience that I had with diseases of the esophagus. It is based upon two facts. In the first place I cannot conceive how a trauma to the chest can affect the esophagus without severely injuring or breaking down the chest wall, or causing obvious internal injuries.

Q. At that point would you describe, Doctor, the position of the esophagus in relation to the chest wall?

A. Well, the esophagus hangs free—fairly free—in the middle of the chest wall, in front of the spine, and behind the heart, and extends from the base of the mouth or the throat down to the opening of the stomach. Hence, it extends throughout the chest.

Q. What, if any, bony structure is located in front of the esophagus?

A. It is protected in front by the sternum of the

(Deposition of Dr. A. Bernard Gray.)

ribs, and on the side by the ribs, and behind by the dorsal spine.

Q. What was the appearance of the contusion expressed in layman's language—or the contusion on this man's forearm—this man's right forearm?

A. The forearm was black and blue, and swollen.

Q. And what would you state, from your experience, is the relative sensitivity of the chest, on the one hand, and the forearm, on the other, to a blow of the nature described by Mr. Lathourakis in his history?

A. Well, if the blow to the chest was as severe as the blow to the forearm, the symptoms in the chest would have been greater. It is a question that is difficult to answer scientifically.

Q. You stated, I believe, Doctor, that X-rays were taken of the chest. Were they taken by you?

A. No. No X-rays were taken of the chest. There was no indication to take X-rays of the chest. There was no local signs of injury or tenderness. X-rays were ordered of the esophagus.

Q. Now, did you have something further to say, or did I interrupt you in your diagnosis and opinion?

A. Yes. I made an opinion, as I felt that I was entitled to make an opinion despite the fact that I am not a specialist in the diseases of the esophagus. I based my opinion mainly on two things.

In the first place, I have seen innumerable injuries to the chest, and I have never seen a complication involving the esophagus.

(Deposition of Dr. A. Bernard Gray.)

In the second place, there was no objective evidence when I examined him ten days after the injury, of any injury to the chest wall.

And, thirdly, the fact that the pathological diagnosis indicated a pre-existing condition; and I offer that opinion for what it is worth.

Q. Doctor, assuming that the condition in the esophagus had not existed, and that your opinion on this question would be related only to the condition of the man's forearm and the contusion at that point, under that assumption, when was the man able to return to work?

A. Well, I felt that he would have been fit to return to work approximately October 1, 1948, although I didn't see him for at least four weeks prior to that time.

Q. In other words——

A. (Interposing): I felt that the period of disability was reasonable, and I would expect, barring any other complications, full return of the function in that time.

Q. And as of that time, did you find a permanent disability in regard only—that is, only to his arm?

A. Well, at the time that I examined him, which was approximately five weeks prior to October 1, I found that the swelling had subsided considerably. There was some residual swelling. And, that he had a good range of motion, but the grasping power of his hand was still weak.

(Deposition of Dr. A. Bernard Gray.)

Mr. Holland: I do not have any more questions.

Cross-Examination

By Mr. Jackson:

Q. Doctor, after the time Mr. Lathourakis came to you, did he tell you, or did you go into details as to how this accident occurred?

A. Yes. I found it a little bit difficult to understand Mr. Lathourakis, as shown by my notes, but there was obviously an accident, and my description there was rather brief because it involved the mention of a boat and a barge and a mast, and I found a difficulty—I know that his hand was jammed between the barge and the mast, and he said that the front of his chest was struck by the mast.

Q. Did he tell you, Doctor, as to how fast the boat was going that he was in that hit the barge?

A. No. I do not have any recollection of those details. I know that this certain type of injury occurred, and I do recall very definitely that it is a little hard for me to visualize it.

Q. And he was a little hard to understand?

A. Yes, he was a little hard to understand.

Q. And did he tell you that following this accident that he was paralyzed from the neck down to, the bottom of his stomach?

A. No.

Q. You did not check that?

A. No.

Q. Did he also tell you that immediately following the accident he had vomited?

A. No, I have no record of that.

(Deposition of Dr. A. Bernard Gray.)

Q. When you speak of regurgitation, Doctor, what is that? To a layman is that vomiting?

A. Food coming up from the stomach. It might be true vomiting, or the food might just reach the mouth and be swallowed again. That is usually what is meant by regurgitation.

Q. And did you get any history from Mr. Lathourakis that after this accident he was taken up to the hospital there at Koggiung and that he tried to take a cup of coffee and that it regurgitated or came up?

A. No. I do not have any history of that. My history of his difficulty in swallowing was obtained I think after the time of the second visit as an incidental finding, and there was a subjective evidence, and I just followed it straight through and left it in the hands of a specialist.

Q. Did he tell you that this swallowing difficulty—difficulty in swallowing solid food, such as meat, that you speak of, that that came on immediately following this accident?

A. No. The way that he put it was this. He said that he could not swallow meat, or that he could not eat meat. In fact, he was not particularly impressed—he did not worry much about that, but he just said that he could not eat meat, and I asked him about that and he said that he could not get it down. And he also told me of course then at a later date, that he had never had that before the injury.

Q. Did he tell you that he had always been in

(Deposition of Dr. A. Bernard Gray.)

the best of health prior to the time that this accident occurred?

A. Yes. His past medical history as far as I can determine, was absolutely negative. He had always been well.

Q. Well, now, Doctor, assuming this, and I would like to ask you this, assuming the fact that he was paralyzed from the neck down to the bottom of his stomach following this accident, I would like to ask you whether or not if that was true, whether this accident would have caused that condition?

A. Whether it is true or not, I do not feel—or let me put it this way, to my own knowledge I have no way where I can say that that accident, or a blow on the chest could have caused this lesion in the esophagus.

Q. My question was whether or not the paralysis that he had immediately following this accident was due to the accident, where he was numb and paralyzed from his neck down to the bottom of his stomach?

A. I have no history of any paralysis. I do not see how the injury could have caused a paralysis unless it would affect his spinal cord. He had no evidence, of course, of any paralysis ten days following the injury—eight days following the injury—when he arrived in Seattle. So I do not see how that injury could have caused a paralysis below the neck.

Q. Well, let me ask you this, assuming that he

(Deposition of Dr. A. Bernard Gray.)

had that as he tells us—that he was numb and paralyzed from the neck down to the bottom of his stomach, would it be reasonable to assume that that condition was the result of this accident that he had? Just answer the question.

Mr. Holland: I think that the Doctor has answered that question.

Mr. Jackson: No, he has not.

A. Yes. I can visualize anatomically or physiologically no condition that would cause local paralysis between the neck and the stomach. So on that basis I cannot answer that question.

Q. Now, Doctor, did he tell you that he was scared to death when this boat struck his barge and he was pinned and struck the way that he was?

A. I have no record of that.

Q. Doctor, do you recognize that fright has an effect on an individual's anatomy where there is a question of life and death involved?

A. Fright has an effect on individuals physiologically. Fright does not change the structure but fright certainly affects the man in innumerable ways as you well know.

Q. Well, assuming this, this man being on this boat—a fishing boat—being towed at 25 miles an hour, and hitting this barge head on, and he was standing in the bow of the boat, and it was a question of what he was going to do to save his life, a person in that fright, I would like to ask you if that fright would be a factor, you might say, in causing

(Deposition of Dr. A. Bernard Gray.)

a disturbance in his stomach and in his heart and in his esophagus and in other organs of his body.

Mr. Holland: I think that that is certainly immaterial as to the other organs of his body other than his esophagus.

A. Oh, yes. It certainly could cause a disturbance in function.

Q. And it would also cause a disturbance of function in the esophagus. A. Yes, sir.

Q. Now, Doctor, I would like to ask you, assuming that he regurgitated and vomited following this accident, would it be reasonable to assume that a man having an accident such as he did, would vomit and regurgitate? A. Yes.

Q. And if he had this fright that he had spoken about, and he had this regurgitation, would not that fright and regurgitation also affect his esophagus?

A. The effect on the esophagus would be the regurgitation.

Q. Now you have stated here that the findings that were made from X-rays and pathological reports indicated that he had what you called an abnormality of the esophagus? A. Yes.

Q. Is that correct? A. Yes.

Q. In other words his esophagus is a little different than that of a person who has a normal esophagus? A. That is right.

Q. That is correct? A. Yes, sir.

Q. Fright and regurgitation may cause a much different reaction in the esophagus where you have

(Deposition of Dr. A. Bernard Gray.)

an abnormal esophagus than where you have a normal esophagus? A. Yes, that could be.

Q. And, Doctor, this fright and regurgitation of the esophagus, or the regurgitation which affects the esophagus, does that cause a spasm to exist in the esophagus? A. Yes, it can.

Q. And when you speak of a spasm of that nature in the esophagus what occurs, putting it in a layman's language?

A. Certain muscles tighten up and tend to restrict.

Q. And does that condition, Doctor, impair swallowing. A. Yes.

Q. You have had occasion to see that during the course of your practice, have you?

A. Yes. As long as the spasm exists, it will impair swallowing.

Q. Well, now, I would like to ask you, based on the history that Mr. Lathourakis has given, and which has been submitted by Mr. Lathourakis, that this difficulty in swallowing occurred immediately following the accident?

Mr. Holland (Interposing): Just a minute. That is not the history that the doctor gave that he obtained from Lathourakis.

Mr. Jackson: All right.

Q. (By Mr. Jackson): I am asking you, Doctor, to assume then that as the history of Mr. Lathourakis has given it——

(Deposition of Dr. A. Bernard Gray.)

Mr. Holland (Interposing): To whom?

Mr. Jackson: As he has first given it to the Board in Alaska in an affidavit which he has prepared——

Mr. Holland (Interposing): All right.

Mr. Jackson (Continuing): And the story that he has already related to the Industrial Board at Juneau, Alaska.

Q. (By Mr. Jackson): Assuming that immediately following this accident he had this numbness or what he describes as paralysis or lack of feeling in the chest or esophagus; that he regurgitated or vomited immediately following the accident, and that he was frightened, as he puts it, to death at the time of the accident, and that this impairment of swallowing came on immediately following the accident; that he tried to drink some—I think he tried to drink some coffee, and he tried to drink some gin to get some relief and regurgitated both the coffee and the gin following this accident, which has also been attested to by his partner—I would like to ask you whether you would have an opinion as to whether or not this lack of swallowing at that time would be due to the fright and regurgitation which followed this accident?

A. I think it is reasonable to assume that it could be.

Q. Did you go into the question at all with him as to when this impairment of swallowing or difficulty in swallowing meat, we will put it, that you got from him—when that occurred?

(Deposition of Dr. A. Bernard Gray.)

A. No, except that it occurred since the injury, and he hadn't had it before.

Q. And he hadn't had it before?

A. That is right.

Q. And you didn't go into what had occurred there in the hospital?

A. No, I didn't go into any of the details.

Q. But that condition was existing at the time when he came to you?

A. When I saw him ten days after the injury he had difficulty in swallowing, and that was corroborated by X-rays. And the evidence showed an organic lesion of the esophagus. And because of that I felt that my function as attending physician had to end at that point as far as the esophagus was concerned.

Q. Well, what happened was this, isn't this correct, that you sent him up to Dr. Hartzell?

A. Yes, sir.

Q. And Dr. Hartzell made a report to you that he found some evidence of a stricture in the esophagus.

A. Dr. Hartzell's conclusion was that there was evidence of an organic defect of the esophagus. It was not a spasm. There was apparently some growth that obstructed it.

Q. And you told Mr. Lathourakis that you felt that it was cancer?

A. No, I arranged for Mr. Lathourakis to have an examination of the esophagus, with a biopsy made, and after that I told him that it was my

(Deposition of Dr. A. Bernard Gray.)

opinion that he had a carcinoma, and unless we could prove otherwise, that he needed immediate treatment.

Q. I mean, during the course of events—during this period you were convinced, after Dr. Hartzell's X-rays and Dr. Webber's biopsy, that in all probability this proved to be cancer.

A. I didn't tell him directly that it was cancer, because I was not in a position to tell him so. I told him that the possibility was—in fact, I told him very little, but I told his friends and family that that was the probable diagnosis, and that he had to have something done immediately.

Q. And that is what you urged him and his friends to have him do,—was to go to have this operation?

A. No. I urged him to see a specialist in those lines, to have whatever treatment was necessary, and I felt sure that it would probably be surgical; that it might be cancer.

Q. Then after he had gone to the Marine Hospital and been examined there, you had a report from there as to what their opinion was too, is that correct?

A. The report that I had from the Marine Hospital officially was after his surgery.

Q. I see.

A. But in the meantime I talked to them—in fact, I talked to Dr. McGowan in and between the time that the man had left the Marine Hospital, and Dr. McGowan felt that he had to have surgery.

(Deposition of Dr. A. Bernard Gray.)

In fact, their initial diagnosis was a carcinoma of the esophagus.

Q. That is what they determined also up there, that he had cancer of the esophagus?

A. On the first examination.

Q. Yes?

A. But not after they concluded the case.

Q. That is, not after they made the operation?

A. That is right.

Q. And immediately after the operation they found that there was no cancer? A. Yes, sir.

Q. That is correct, is it? A. Yes, sir.

Q. Now, Doctor, as I understand you made no examination of the arm condition and, as I understand it, the last examination you made of the arm was made about Sept. 1, 1948? A. About.

Q. About? A. Yes, sir, approximately.

Q. So you made no determination on October 1st, or at any other time as to whether or not there was partial disability in the arm?

A. No, that was just a reasonable assumption based upon his progress.

Q. And the operation was recommended in this case, Doctor, for the purpose of improving or eliminating this complaint of not being able to swallow?

A. It was to relieve his obstruction?

Q. That is what they recommended the operation for? A. Yes, sir.

Q. And it was hoped that this operation would eliminate the difficulty of swallowing food that he

(Deposition of Dr. A. Bernard Gray.)

had complained about that had followed this accident?

A. That it would relieve the obstruction.

Mr. Holland: You are referring now to what was hoped and what was concluded by the doctor who performed the operation, and not the witness.

Q. (By Mr. Jackson): Well, this man came in, and one of the reasons or the principal reasons why this study of this esophagus was made was because of his complaint of inability to swallow?

A. Difficulty in swallowing, yes, sir.

Q. That is correct? A. Yes, sir.

Q. And the operation was in order to relieve that?

A. Well, yes, I mean, there are two factors. In order to relieve that, and also with the presumptive diagnosis of carcinoma you know that the man is going to die if some attempt is not made to treat the carcinoma.

Q. I would like to ask you to assume this, Doctor, assuming these symptoms that I have stated Mr. Lathourakis has stated to the Alaska Industrial Board that followed this accident, isn't it reasonable to assume that if these symptoms are true, as I have heretofore stated them, that followed the accident—that is, the fright, the regurgitation, the numbness that he felt in the chest to down in his stomach, and then the lack of ability to swallow, and then—if it is not reasonable to assume that all those symptoms that followed this accident and persisted to restrict the swallowing, up to the time of

(Deposition of Dr. A. Bernard Gray.)

the operation—if it is not reasonable to assume that those symptoms are the result of the accident?

A. The symptoms are the result of whatever the basic cause of the condition is. If the basic cause of the condition is a thickened organic stricture of the esophagus it is impossible for me to state that that condition is due to the injury. If the symptoms are due to spasm alone, then I feel that it is reasonable to assume with that definite history that this symptom of difficulty of swallowing is due to the injury.

Q. Well, then——

A. (Interposing) But from a medical standpoint and from my knowledge of what has transpired and what the findings were, I feel of course that he obviously had a pre-existing condition. So I cannot lay all of the symptoms due to the injury.

Q. All right. What I am primarily interested in is this, this spasm would follow fright and an injury to the chest, such as he had, and under the conditions that he had? A. It could.

Q. And such a spasm could affect, as you once said, the esophagus?

A. Well, the spasm is the effect on the esophagus.

Q. All right. And, also, the spasm would naturally affect this thickening of the esophagus?

A. I do not know how it could affect the thickening. You see, a person can swallow with a partial obstruction of the esophagus, and probably not know it, and a spasm which perhaps in a normal

(Deposition of Dr. A. Bernard Gray.)

man would not cause a temporary obstruction, would cause in a man with an abnormal esophagus a temporary obstruction. And then, obviously, he is able to eat, because all that he could not eat was meat. That is, solid chunks of food as his condition progressed.

Q. Doctor, the record shows here, and it has been submitted to the Board, that during the time that he was here he developed a condition in the esophagus where he could not swallow anything?

A. It became progressively worse, yes.

Q. And is that a spasm that results in the esophagus when they cannot swallow anything?

A. No. It is a real obstruction. It is something growing in the walls of the esophagus as to narrow it and obstruct it.

Q. The record shows that he was able to swallow soft foods, but as he told me, and I would like to have you assume that in this question—the information that he furnished was that he had——

Mr. Holland: (Interposing) Now, I think that you should ask this doctor a hypothetical question, if you want to phrase it that way. I do not believe you can testify in this way.

Q. (By Mr. Jackson): Assuming, Doctor, that he was able to eat soft foods during the time that he was under your treatment, and then after he learned that you had told his friends—learned through his friends that you had told them that he should go and have this operation because he had cancer—and that if he didn't have this operation he

(Deposition of Dr. A. Bernard Gray.)

was going to die, and immediately following that——

A. (Interposing) I told him of that possibility.

Q. Now, just assume that. Assume that he got that information immediately, and following that, as he did, he became angry and he could not swallow anything—could not even swallow water—then he had to go to a doctor, and after a couple of days' treatment, why he was relieved of that condition, would that be a spasm—a condition of that kind, would that be a spasm of the esophagus?

A. It might be a superimposed spasm under those conditions.

Q. And, Doctor, I assume that in the course of your practice you have never had the opportunity of seeing the results of an accident such as has been described here, and a spasm following that that has affected an abnormal esophagus that you speak of?

A. No, I never had that experience. I would like to make that clear too. I mean I want to make it clear, that I am not a specialist in the diseases of the esophagus, but in traumatic surgery.

Q. Yes, Doctor. Now, Doctor, I would just like to ask you a few more questions, and then I am through. You, I believe, testified in the case of Mr. Landro, that you examined all of the people going to Alaska for Libby, McNeill & Libby?

A. Most of them.

Q. And then you treat and see all of the accident cases of Libby's?

(Deposition of Dr. A. Bernard Gray.)

A. I try to see them all. I do not treat them all. I refer some of them for treatment. I refer some to their home town doctors for treatment. Those I feel confident to treat in Seattle, I treat.

Q. And you do that work, I believe you stated, on a fee basis instead of a retainer basis?

A. On a fee basis.

Q. And you are called upon by Bogle, Bogle & Gates to make examinations from time to time?

A. Yes, sir.

Q. Of cases? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Mr. Jackson: I think that is all.

Redirect Examination

By Mr. Holland:

Q. Doctor, did you see anything further of Lathourakis after the time you referred him to an expert?

A. I think that he came in several times and we treated him by diathermy, and encourage him in the use of exercise, and massage.

Q. This is with reference to his arm?

A. This is with reference to his arm. The only thing that I did insofar as the condition in his esophagus was concerned was to make an attempt to see that he got treatment.

Q. And you did not make the decision that an operation was to be done, or direct that it be done?

A. No, not at all.

(Deposition of Dr. A. Bernard Gray.)

Q. That is, you just didn't do that?

A. No, sir.

Q. Doctor, isn't it true that fright of a kind that possibly has been described by Mr. Jackson would affect a normal individual such as he would obtain a spasm in his esophagus in the same manner, if the fright was of sufficient magnitude?

A. Well, in my experience spasm of the esophagus occurs more from chronic fright than acute fright. It is distinctly a symptom of nervousness, and there is a well established condition called cardio spasm, which is a spasm of the lower end of the esophagus, which prevents people from swallowing, and which is physiological in origin and, as I say, is due to chronic fright rather than acute fright.

Q. Doctor, would that kind of a spasm, or the kind that you have testified to possibly have resulted from the fright in this instance—would those kinds of spasms cause or damage the strictures or damage the lesions in the esophagus?

A. Not that I know of or ever heard of.

Mr. Holland: Those are all the questions that I have.

Mr. Jackson: I would just like to ask you this question, Doctor. Could the spasm of the esophagus, together with the regurgitation that followed in the esophagus in Mr. Lathourakis's case, aggravate an organic lesion in the esophagus.

A. I think it could.

(Deposition of Dr. A. Bernard Gray.)

Mr. Jackson: That is all.

Mr. Holland: Do you agree, Mr. Jackson, to the waiving of the witness's signature to his deposition?

Mr. Jackson: I do.

Mr. Holland: And is that agreeable with you, Doctor, that you waive your signature to your deposition?

The Witness: Yes, I do.

Mr. Holland: That is all.

(Witness excused.)

(Deposition concluded.)

State of Washington,
County of King—ss.

I Hereby Certify that on the 22nd day of June, 1949, before me, E. E. Lescher, a Notary Public in and for the State of Washington, at 602 Central Building, Seattle, King County, Washington, personally appeared pursuant to stipulation by the Applicant and the Defendant through their respective attorneys, beginning at the hour of 1:00 p.m., Dr. A. Bernard Gray, called as a witness on behalf of the Defendant in the above-entitled matter; and

Roy E. Jackson, Esq. appearing on behalf of the Applicant, represented by Henry Roden, Esq., his attorney.

Robert V. Holland, Esq., (of Messrs. Bogle, Bogle & Gates) appearing on behalf of the Defendant, representing R. E. Robertson, Esq., its attorney;

The above-named witness, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing transcript of deposition set out.

I Further Certify that the said deposition has been reduced to typewriting under my personal direction, by a competent person, and that the deposition is a correct transcript of the testimony as given by the witness, and that the same has been retained by me for the purpose for sealing up and directing the same to the Clerk of the Board, as required by law.

I Further Certify that the reading over by or to the said witness of the said deposition, and the transcription of the said witness to his said deposition, were by the parties hereto, and the witness himself, expressly waived.

I Further Certify that I am not of counsel or attorney to either or any of the parties, nor am I interested in the event of the cause.

Witness my hand and official seal at Seattle, Washington, this first day of July, 1949.

/s/ E. E. LESCHER,

Notary Public in and for the State of Washington,
residing at Seattle.

STIPULATION

It is hereby stipulated by and between the applicant through his attorneys, Henry Roden, Esq., and Roy Jackson, Esq., and defendant, Libby, McNeill & Libby, a corporation, through its attorneys, R. E. Robertson and Bogle, Bogle & Gates, that the records of the Peninsula Packers show that the applicant, Peter Lathourakis, was employed by Peninsula Packers during the 1949 Bristol Bay salmon fishing season as a gill net fisherman at Ugashik, Alaska as a fishing partner of Chris Coulas, who was the boat captain; that for said season the said applicant and his fishing partner, Chris Coulas, caught 8,400 fish. That said applicant was paid by Peninsula Packers the sum of \$1328.67 plus \$200.00 run money, or the sum of \$1528.67.

It is further stipulated that this testimony shall be considered by the Alaska Industrial Board as evidence on behalf of defendant.

Dated at Seattle, Washington, August 13, 1949.

/s/ HENRY RODEN,

/s/ ROY E. JACKSON,

Attorneys for Applicant.

BOGLE, BOGLE & GATES,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

Received Aug. 8, 1949.

MINUTE ORDER OF JANUARY 18, 1950

Journal No. 19, Page 360

These cases came before the court for hearing on plaintiff's appeal from the decision of the Industrial Board. R. E. Robertson appeared for plaintiff and Henry Roden appeared in behalf of the claimants. Mr. Robertson argued plaintiff's case at great length, closing the same at 5:10 p.m.

LETTER RE PETER LATHOURAKIS

Drs. Slyfield & Nelson,
Diseases of the Heart and Lungs,
Medical and Dental Building,
Seattle 1.

February 23, 1949

City Office Of Laurel Beach Sanatorium

Dr. Frederick Slyfield,
Dr. John E. Nelson,
Dr. Averly M. Nelson.

Mr. Roy E. Jackson,
Attorney at Law,
1207 American Building,
Seattle 4, Washington.

Re: Peter Lathourakis

Dear Mr. Jackson:

According to your request Mr. Lathourakis appeared at my office February 17, 1949.

The claimant confirms the story contained in the

information submitted by you, to the effect that he received a crushing blow on the chest on a sailing fish boat on July 16, 1948. According to claimant's statement he foresaw the catastrophe approaching and braced himself by putting his arms around the mast. His vessel struck a scow with terrific force which was transmitted to his chest and right arm. The accident was promptly followed by swelling and exudation of blood into the tissues to such extent that the right arm and the chest were "black and blue" and swollen, and the arm was numb. Two days after the injury he had difficulty in swallowing solid food. He had the impression that food stopped in the top of the esophagus. An occasion arose early in October when for three days he was unable to swallow anything, even water.

Several medical men saw the case and there was grave suspicion of cancer of the esophagus. However, the situation was finally determined by surgery at the Marine Hospital where, on October 11, 1948, the thorax was opened. The wall of the esophagus was found to be two to three times the normal thickness, the thickening extending from the arch of the aorta to the entrance to the stomach. A small hiatus hernia of the stomach was also found. A piece of tissue was taken from the thickened wall for preparation for microscopic examination. This section revealed displaced mucosa with gastric glands in the esophagus, and chronic esophagitis. Esophagogastrostomy of Mikulicz type was performed at the same operation.

Although the function is not entirely normal, swallowing is much more comfortable than previously. He complains now of pain in the left thorax and shortness of breath on walking. These two symptoms are presumably the result of the necessary surgery.

Examination

Claimant is a white male (Greek) 60 years old. He is five feet nine inches tall and weighs 156 pounds. He states his customary weight is 180 pounds. He looks fairly well and does not appear to be in any distress. The blood pressure is 130/86. The blood sedimentation rate is 6 mm. in 60 minutes, which is normal. The vital capacity is 3 liters which equals 68% of normal. The urine is normal.

A long scar is seen on the back of the left thorax which represents the large incision necessitated by the peculiar nature of the case. There is slight restriction of expansion of the left side of the thorax. Auscultation reveals only diminished breath sounds, particularly in the left base.

The X-ray film shows the lung fields to be clear except for the lower part of the left lung field which is retracted and hazy and the left diaphragm is elevated. This is presumably due to the surgery and is the major explanation for the shortness of breath as obviously a considerable portion of the left lung is not expanding normally in respiration. The flouroscope shows there is still some constriction in the upper esophagus and a widening in the lower

part. The barium goes through to the stomach, but more slowly than normally.

From my study of the case the finding of markedly thickened esophageal wall appears acceptable and the misfortune has been definitely improved by surgery. Because of probable cicatrization resulting from surgery it is as yet rather early to prognosticate the end result.

As to the cause of this misfortune many etiological factors might be conjectured. One cannot avoid being seriously influenced by the history. Mr. Lathourakis had no complaints up to the moment of the accident, yet immediately after it the train of symptoms arose which clearly led to the disaster on which claimant bases his complaint. I do not assert proficiency in disturbances of the esophagus, but the story, the findings at the operation, the pathological report and the present condition are, to me, convincing evidence that the accident was responsible for the chain of events.

Respectfully submitted,

/s/ FREDERICK SLYFIELD, M. D.

LETTER RE PETER LATHOURAKIS

Lowell E. Williams, M. D.,
1004 4th & Pike Bldg.,
Tel. Eliot 1243,
Seattle 1, Wash.

March 23, 1949.

Roy E. Jackson, Attorney at Law,
American Building,
Seattle, Wash.,

Re: Peter Lathourakis.

Dear Mr. Jackson:

Mr. Lathourakis was re-examined at your request March 22, 1949, to determine disability resulting from his accident of July 16, 1948, at which time he sustained injury to the chest and right forearm, a crushing injury to the latter.

He had an esophagostomy performed October 11, 1948, the approach being through the left side of the chest. This was done for an esophageal lesion which, according to the man's history, began to be evident within 24 hours following the accident, and was characterized by obstruction to swallowing food; later, even liquids. He states that he had never previously had similar difficulty. The pathological report on sections of tissue from the involved area of the esophagus indicate an inflammatory reaction.

His complaints at this time are shortness of breath on slight exertion, such as walking two or

three blocks, pain in the lower left chest with cough. He has to eat small meals four or five times daily, as a larger quantity of food in the stomach causes pain in the left shoulder. He states that he has no power in gripping with the right hand (he is right-handed), and that there is numbness of the index and middle fingers, occurring intermittently.

Examination shows that he has lost about 45 pounds since the operation, and has regained about 20 pounds in the past two month. There is limitation of motion of the left rib cage, and under the flouroscope the left diaphragm is elevated and the lower lobe of the lung appears partly collapsed. Heart and blood pressure are normal.

Grip in the right hand is decreased to approximately 40% of that of the left hand. The numbness of the fingers of which he complains can be explained by medial and radial nerve damage in the forearm.

The man in his actions and appearance gives an impression of general weakness. This has been produced by the effects of the accidental injuries and by the strain and shock of the operation.

In my opinion the history of the accident and the man's history together with the x-ray and pathological evidence and the findings at operation, indicate convincingly that the accident was the responsible cause for the esophageal injury, probably by bruising of the esophagus by the mediastinal contents as a result of impact.

He has suffered permanent disability as a result

of the injuries sustained in his accident of July 16, 1948. The disability resulting from the chest injury and subsequent necessary surgical work is estimated at 65% of the maximum for unspecified permanent partial disability, and that to the major forearm at 20% of the amputation value of the major upper extremity at the elbow.

It is expected that some strength of grip will be regained in the forearm with increased use and that some improvement of the present state of general weakness will ensue. This is taken into consideration in the above ratings. Otherwise, I feel that his condition is fixed at this time.

The man has been totally disabled for work since the date of injury, and is still disabled for any but the lightest work.

Very truly yours,

/s/ L. E. WILLIAMS, M.D.

OPINION

R. E. ROBERTSON,
Attorney for plaintiff.

J. GERALD WILLIAMS,
Attorney General of Alaska,

JOHN DIMOND,
Assistant Attorney General of Alaska,
For Alaska Industrial Board,

HENRY RODEN,
For Peter Lathourakis.

This is a proceeding to set aside an award of the Alaska Industrial Board to the defendant Lathourakis for temporary and partial permanent disability.

On July 16, 1948, Lathourakis was injured in a collision between his fishing boat and a scow, sustaining severe injuries to his chest and arm. Upon being extricated from the position in which he had been pinned, he took a drink of gin, but vomited. Thereafter, he was unable to swallow solid food, was hospitalized and on July 23rd flown to Seattle for further treatment. The examination made there indicated cancer of the esophagus. On October 11, 1948, an operation was performed which involved the removal of a rib and the opening of the chest, a lung was collapsed, the diaphragm was split, the position of the stomach was changed by elevating it up to the middle third of the esophagus and the two were sewn together. The diaphragm was then sewn to the side of the stomach and the stomach itself to the vertebral column and the chest wall.

On September 28, 1949, the Board allowed Lathourakis \$3833.15 for temporary disability to May 20, 1949. The Board also found that his permanent disability consisted of residual weakness in his right hand, lack of stamina and endurance, shortness of breath and difficulty in performing any manual labor due to the restricted diet necessitated by the condition of his esophagus and awarded him \$3600 for 50% permanent disability.

The plaintiff contends:

(1) That there was no competent evidence of temporary disability to May 20, 1949, or of permanent disability.

(2) That permanent disability, if any, resulted from the operation necessitated by a condition of the esophagus which was congenital and, hence, wholly unrelated to the injuries; and

(3) That fairly construed, the statute does not authorize the cumulation of allowances for temporary and permanent disability.

The first contention is based on the fact that the expert medical evidence submitted on behalf of the defendant Lathourakis consisted of unsworn affidavits, inadmissible as hearsay and directly contradicted by the plaintiff's medical testimony. Undoubtedly an award based solely on hearsay cannot stand and so the next inquiry is whether the remaining evidence consisting of the testimony of the defendant Lathourakis and his witnesses is sufficient

to sustain the findings of the Board as to temporary and permanent disability. Plaintiff contends, so far as permanent disability is concerned, that it is insufficient under the rule that lay witnesses are incompetent to testify to the cause of disability. It may be that neither the defendant Lathourakis nor his witness is competent to testify that the condition of the esophagus or its aggravation resulted directly from the injury, but the testimony of the defendant himself, as to his condition before, immediately after and since the injuries were sustained, is competent, and from this, in connection with evidence reciting the sequence of events, the Board was authorized to infer—expert testimony to the contrary notwithstanding—that there was a causal relation between the injuries and the condition of the esophagus, regardless of whether the condition was congenital and, therefore, merely aggravated, or the esophagus was directly injured. The evidence in this case would appear to clearly sustain plaintiff's view that there was no such causal connection, but the Court is not permitted to weigh the evidence, nor may it, because the evidence is susceptible of contrary or other inferences, usurp the fact finding prerogative of the Board. *Contractor v. Pillsbury*, 150 F.(2) 310 (9 Circ.); *Western & Atlantic Railroad Company v. Gardner*, 40 S.E. (2nd) 672, 675 (Georgia); *Ballenger v. Southern Worsted Corporation*, 40 S.E. (2nd) 681, 682 (S.C.); and any doubt must be resolved in the claimant's favor. *Liberty Mutual Insurance Company v. Hoage*, 65 F. (2) 822, 824. So far as the period of

temporary disability is concerned, while the evidence is far from satisfactory, the Court cannot say that it is insufficient.

The remaining contention that allowances for temporary and permanent disability may not be cumulated, is based upon an analysis and reconstruction of the Workmen's Compensation Statute, Sections 43-3-1-39 ACLA, 1949, which though plausible, appears to rest largely on conjecture and speculation as to legislative intent. It may be granted that the language of the act is somewhat inapt, ambiguous and inconsistent and that it encourages malingering for the purpose of prolonging temporary disability payments, but in my opinion it is not reasonably susceptible of the construction urged by plaintiff, and in any event, doubts must be resolved in favor of the employee.

Plaintiff also urges that in determining defendant's earning capacity, the Board erroneously added \$1500, representing the amount that the defendant testified he had earned in self-employment during the first four months in 1948 and which he could have earned in the employ of another had he not chosen to work on his own fishing boat, to \$5300, the amount of his earnings in 1947. On behalf of the defendant, it is argued that this item of \$1500 represents the exemptions allowed under the Federal Income Tax Law for 3 dependents. An examination of the evidence, however, wholly fails to sustain defendant's contention and, hence, the Court is of the opinion that the Board misapplied the law in adding the value of the defendant's services in self-employ-

ment outside of the year 1947 to the earnings for that year, especially since his earnings for that year appear to be typical.

Plaintiff also contends that there should be deducted from the award for temporary disability, the sum of \$1724.08 paid to the defendant under a provision of the contract of employment apparently requiring payment of wages or earnings for the remainder of the fishing season regardless of any disability incurred in the meantime. But since the contract was not introduced in evidence by the plaintiff, the Court cannot find that defendant's right to receive the remainder of his pay did not accrue on the date of his injury. Indeed, in the absence of such evidence, the Court cannot consider this point.

It also appears that as a result of errors in computation, \$1050.80 paid previously to the award was not deducted and the period of temporary disability was computed at 315 instead of 307 days. Since these are mere mathematical errors which the parties indicated would be corrected, it is unnecessary to discuss them.

It is the opinion of the Court that the award should be modified as pointed out and that as so modified, it should be affirmed.

GEORGE W. FOLTA,
District Judge.

Filed February 9, 1950.

[Endorsed]: Filed February 15, 1950.

JUDGMENT

This cause came on regularly for hearing before the Court on appeal by plaintiff from a decision and award made and rendered by the Alaska Industrial Board on September 28, 1949, in a proceeding then pending before said Board wherein and whereby it awarded to the defendant Peter Lathourakis the sum of \$3833.55 as temporary disability compensation, covering a period of 315 days at the rate of \$12.17 per day, and the sum of \$3600.00 as partial permanent disability, for injuries sustained by said defendant Lathourakis arising out of and in the course of his employment by plaintiff.

Upon consideration of the evidence submitted and the argument of counsel for the respective parties, the Court finds there is sufficient evidence to sustain the findings and award of said Board and save and except in the following particulars, to wit:

(a) Said Board erred in computing the average daily earnings of said Lathourakis, which the Court now finds to have been the sum of \$14.52 and 65% thereof amounts to the sum of \$9.43;

(b) Said Board erred in computing the number of days during which said Lathourakis was temporarily disabled which the Court finds to have been 307 and no more; and that to the extent herein set forth said award should be and the same is hereby modified.

Wherefore, premises considered: It Is Ordered, Adjudged and Decreed that said defendant Peter Lathourakis do have and recover of and from the

plaintiff total temporary disability compensation of \$2005.00 [being \$9.43 (65% of average daily wage of \$14.52) for 307 days, together with interest at the rate of eight per cent per annum computed on the basis of monthly payments of \$282.90 (30x\$9.43) from November 8, 1948, the date on which such first monthly payment became due, which interest amounts to \$159.99, less \$1050.00 heretofore paid by plaintiff the defendant Lathourakis on account of said total temporary disability compensation]; and

It Is Further Ordered, Adjudged and Decreed that the defendant Lathourakis do have and recover from the plaintiff the sum of \$3600.00 as compensation for 50% permanent disability sustained by him while employed by plaintiff and in the course of his employment, together with interest thereon at the rate of eight per cent per annum from September 28, 1949, until paid, together with his costs and disbursements herein, including an attorney's fee of \$350.00.

Done in open court at Juneau, Alaska, this 24th day of March, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

Entered Court Journal Page 408, No. 19.

[Endorsed]: Filed March 24, 1950.

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from that certain Final Judgment entered in the above-entitled cause on March 24, 1950.

Dated at Juneau, Alaska, this 28th day of March, 1950.

/s/ R. E. ROBERTSON,
Attorney for Plaintiff.

Copy received March 31, 1950.

/s/ HENRY RODEN,
Attorney for
Defendant Lathourakis.

[Endorsed]: Filed April 3, 1950.

SUPERSEDEAS ON APPEAL

Whereas, Libby, McNeill & Libby, the plaintiff corporation in the above action, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment rendered against it in the above action by the District Court for the Territory of Alaska, First Judicial Division, on March 24, 1950, in favor of the defendant Peter Lathourakis for total temporary disability compensation of \$2,005.00 under the Workmen's Compensation Law of Alaska, and also for 50%

permanent disability compensation of \$3,600.00 under said law, together with interest thereon at the rate of 8% per annum from September 28, 1949, until paid, together with said defendant Lathourakis' costs and disbursements, including an attorney's fee of \$350.00; and

Whereas said plaintiff is desirous of staying the execution of said judgment so appealed from, and the defendants have agreed that the penal amount of the supersedeas shall be \$5,000.00.

Now, Therefore, in consideration of the premises and such appeal, we, Libby, McNeill & Libby, plaintiff corporation, as Principal, and the Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and engaged in and authorized to engage in business in the Territory of Alaska, as Surety, do hereby jointly and severally undertake and promise, and acknowledge ourselves bound in the sum of \$5,000.00 that the plaintiff corporation Libby, McNeill & Libby will satisfy said judgment in full, together with all costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and will satisfy in full such modification of said judgment and such costs, interest, and damages, as the appellate court may adjudge and award.

In Witness Whereof Libby, McNeill & Libby, plaintiff corporation, as Principal, and Maryland Casualty Company, a corporation, as Surety,

have caused these presents to be executed this 29th day of March, 1950, in Juneau, Alaska.

LIBBY, McNEILL & LIBBY,
Principal.

By /s/ R. E. ROBERTSON,
Its Attorney and Agent.

MARYLAND CASUALTY
COMPANY,
Surety.

[Seal] By /s/ ALLEN SHATTUCK,
Its Attorney-in-Fact and
Agent.

Attest: Corporate Seal.

Executed in the presence of:

/s/ EILEEN ROBERSON,
/s/ F. O. EASTAUGH,
/s/ DORA M. SWEENEY,
/s/ SHIRLEY M. CADY.

United States of America,
Territory of Alaska—ss.

Acknowledged before me this 29th day of March, 1950, in Juneau, Alaska, by R. E. Robertson as attorney and agent of the plaintiff corporation Libby, McNeill & Libby as its free and voluntary act and deed and by Allen Shattuck as attorney-in-fact and agent on behalf of the Maryland Casualty

Company, a corporation, surety, as the latter's free and voluntary act and deed.

Witness my hand and official seal the day and year herein first written.

[Seal] /s/ FREDERICK O. EASTAUGH,
Notary Public for Alaska.

My commission expires June 10, 1950.

Approved as to form, amount, and sufficiency of surety this 31st day of March, 1950.

/s/ HENRY RODEN,
Attorney for Defendant
Peter Lathourakis.

Approved and appeal allowed this 3rd day of April, 1950, at Ketchikan, Alaska.

/s/ GEORGE W. FOLTA,
Judge of the District Court for the Territory of
Alaska, Division No. One.

[Endorsed]: Filed April 3, 1950.

STATEMENT OF POINTS

Plaintiff corporation, Libby, McNeill & Libby, appellant herein, intends to rely upon the following points on appeal.

1. Under the Workmen's Compensation Act of Alaska the Alaska Industrial Board's findings, decision and award must be based upon competent evidence, and not upon ex parte, hearsay, unverified, or other incompetent evidence, whereas the Board's decision and award and its findings herein were based upon ex parte, hearsay, unverified, or other incompetent evidence and therefore were not conclusive upon the District Court.

2. The only competent evidence adduced at the hearing before the Alaska Industrial Board proved that Lathourakis' total temporary disability ended on October 1, 1948, whereas the Board's decision and award as well as the District Court's judgment held he suffered total temporary disability until May 20, 1949.

3. The only competent evidence adduced at the hearing before the Alaska Industrial Board proved that Lathourakis was entitled to total temporary disability compensation of \$1,050.80 only which he was paid prior to his filing of his application for adjustment of claim, whereas the District Court's judgment allowed him total temporary disability compensation of \$2,005.00, which was additional to said \$1,050.80.

4. The only competent evidence adduced at the

hearing before the Alaska Industrial Board proved that Lathourakis suffered no permanent disability from an injury by accident arising out of and in the course of his employment, whereas the Board's decision and award as well as the District Court's judgment allowed him compensation of \$3,600.00 for 50% permanent disability.

5. The District Court's judgment disregarded the fact that the Alaska Industrial Board's decision and award and its findings were based solely upon *ex parte*, hearsay, unverified or other incompetent evidence, and were against the weight of the only competent evidence adduced at the hearing before the Board particularly in respect to:

(a) Finding Lathourakis suffered total temporary disability to May 20, 1949, instead of to October 1, 1948, only;

(b) Awarding Lathourakis total temporary disability compensation of \$3,833.55 (reduced by judgment to \$2,005.00), instead of only \$1,050.80 already paid;

(c) Finding Lathourakis suffered 50% permanent disability, whereas he suffered no permanent disability;

(d) Awarding Lathourakis compensation of \$3,600.00 for 50% permanent disability, whereas he was entitled to no permanent disability compensation,

which erroneous findings were not conclusive upon the District Court.

6. The Workmen's Compensation Act of Alaska does not authorize or provide for the award for the same injury to the same employee not only of temporary, either partial or total, disability compensation but also of permanent, either partial or total, disability compensation arising by accident out of and in the course of his employment, whereas the District Court's judgment as well as the Alaska Industrial Board's Decision and award allowed Lathourakis, who sustained only one injury in the same accident, total temporary disability compensation up to May 20, 1949, amounting under the judgment to \$2,005.00, and 50% permanent disability compensation of \$3,600.00.

7. The District Court was without jurisdiction to allow and assess an attorney's fee of \$350.00, or any sum, to Lathourakis for services of his attorney in the proceedings before that Court.

/s/ R. E. ROBERTSON,
Attorney for
Plaintiff-Appellant.

Copy received April 18, 1950.

/s/ HENRY RODEN,
Attorney for Defendant
Peter Lathourakis.

/s/ J. GERALD WILLIAMS,
Attorney General for Alaska and Attorney for
Alaska Industrial Board.

[Endorsed] : Filed April 18, 1950.

In the District Court for the Territory of Alaska,
Division Number One at Juneau

No. 6200-A

LIBBY, McNEILL & LIBBY, a Corporation,
Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commissioner, At-
torney General for Alaska, and the Territorial
Commissioner of Labor, and PETER LA-
THOURAKIS,

Defendants.

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Plaintiff corporation Libby, McNeill & Libby, ap-
pellant herein, hereby designates the hereinafter
mentioned portions of the record, proceedings, and
evidence, to be contained in the record on appeal
and requests the Clerk of the above court, to
promptly prepare and under his hand and the seal
of the Court to transmit to the United States Court
of Appeals for the Ninth Circuit a true copy thereof
in accordance with the rules of the appellate court,
but to omit from all papers, except this Designa-
tion, the title of the court and the number and title
of the cause, namely:

1. This Designation.
2. Complaint and appeal from decision and

award of Alaska Industrial Board under the Workmen's Compensation Act of Alaska, together with the three exhibits thereunto attached, namely:

- I. Application for Adjustment of Claim.
 - II. Admission of Service and Answer to Application.
 - III. Decision and Award of Alaska Industrial Board.
3. Stipulation making Lathourakis a party defendant.
 4. Answer of defendant Lathourakis.
 5. The appellant's objections, namely: That "no evidence is admissible which is ex parte and which does not give the defendants the opportunity to cross-examine the person by whom such inadmissible evidence was adduced" and "the Board has no power or authority to award both temporary disability and permanent partial or total disability and, if any permanent partial or total disability is awarded, then no temporary disability can be awarded" made not only in its brief before the Board but also at the hearing before the Board.
 6. Defendant Lathourakis' deposition.
 7. Defendant's witness Fred Scheel's deposition.
 8. Letter of Dr. L. E. Williams of May 20, 1949.
 9. Deposition of Dr. Thorburn S. McGowan, appellant's witness.
 10. Deposition of Dr. A. Bernard Gray, appellant's witness.
 11. Stipulation of August 13, 1949.

12. Minute Order of January 18, 1950.
13. District Court's opinion.
14. Judgment of March 24, 1950.
15. Notice of Appeal.
16. Supersedeas on Appeal.
17. Statement of Points upon which appellant intends to rely, and which are filed herewith.
18. All docket entries.

/s/ R. E. ROBERTSON,
Attorney for Plaintiff-
Appellant.

Copy received April 18, 1950.

/s/ KENNY RODEN,
Attorney for Defendant,
Peter Lathourakis.

/s/ J. GERALD WILLIAMS,
Attorney General for Alaska and Attorney for
Alaska Industrial Board.

[Endorsed]: Filed April 18, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The defendant Peter Lathourakis respectfully suggests and requests that in addition to the portions set forth in plaintiff's-appellant "Designation of Contents of Record on Appeal" the following enumerated parts of the evidence submitted upon the hearing of said cause by said defendant Lathourakis, be made a part of said record on appeal, to wit: The letter of Doctor Frederick Slyfield, dated February 23, 1949, and the letter of Doctor L. E. Williams, dated March 23, 1949.

/s/ KENNY RODEN,

Of Attorneys for Defendant
Peter Lathourakis.

Copy received May 9, 1950.

/s/ R. E. ROBERTSON,

Attorney for Plaintiff,
Libby, McNeill & Libby.

[Endorsed]: Filed May 9, 1950.

CERTIFICATE

United States of America,
District of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 122 pages of typewritten matter, numbered from 1 to 122, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the Designation of Contents of Record on Appeal of Appellant on file herein and made a part hereof, in Cause #6200-A, wherein Libby, McNeill & Libby, a corporation, is Plaintiff-Appellant and Alaska Industrial Board, et al., and ePter Lathourakis are Defendants-Appellees, as the same appears of record and on file in my office; that said record is by virtue of an appeal in this cause.

And I further certify that by stipulation of the parties and with the consent of the Court the reporting of this case by the Official Reporter was waived.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Fifty-three Dollars and 15/100 has been paid to me by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand

and the seal of the above-entitled court this 23rd day of May, 1950.

J. W. LEIVERS,

Clerk of District Court.

By /s/ P. D. E. McIVER,

Deputy.

[Endorsed]: No. 12562. United States Court of Appeals for the Ninth Circuit. Libby, McNeill & Libby, a Corporation, Appellant, vs. Alaska Industrial Board, composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor, and Peter Lathourakis, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, First Division.

Filed June 1, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12,562

IN THE

United States Court of Appeals
For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),
Appellant,

VS.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commis-
sioner, Attorney General of Alaska and
the Territorial Commissioner of Labor,
and PETER LATHOURAKIS,
Appellees.

BRIEF FOR APPELLANT.

R. E. ROBERTSON,

Seward Building, Juneau, Alaska,

ROBERT W. HOLLAND,

BOGLE, BOGLE & GATES,

Central Building, Seattle 4, Washington,

Attorneys for Appellant.

FILED
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No. 12,562

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation),
Appellant,

vs.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commis-
sioner, Attorney General of Alaska and
the Territorial Commissioner of Labor,
and PETER LATHOURAKIS,
Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF PLEADINGS AND FACTS.

A. JURISDICTIONAL STATUTES.

The Workmen's Compensation Act of Alaska (full text, Appendix A) provides:

“Section 15. **PROCEDURE IN DISPUTED CLAIMS.**
If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or, if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6, and afterwards disagree

as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties."

Section 43-3-15, ACLA 1949, Volume 2.

The act further provides:

"Section 16. REVIEW BY FULL BOARD. If an application for review is made to the Industrial

Board within ten days from the date of an award, made by less than all the members, the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith."

Section 43-3-16, ACLA 1949, Volume 2.

The act further provides:

"Section 22. COURT REVIEW; QUESTION OF LAW. An award of the Board, by less than all of the members, as provided in Section 15, if not reviewed as provided in Section 16, shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if the award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the District in which the injury occurred. The orders, writs and processes of the courts in such proceeding may run, be served, and be returnable in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such pro-

ceeding unless, upon application for an interlocutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage. * * *"

Section 43-3-22, ACLA 1949, Volume 2.

The act further provides:

"Section 25. JURISDICTION OF COURT. No court of this Territory, except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties."

Section 43-3-25, ACLA 1949, Volume 2.

Section 1291 of the new Federal Judicial Code provides:

"Section 1291. Final Decisions of District Courts. The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United

States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.”

Title 28, USCA Judiciary and Judicial Procedure, Section 1291.

B. PLEADINGS.

“Application for Adjustment of Claim” filed with Board by appellee Lathourakis, dated April 13, 1949. R. 8-10.

“Admission of Service and Answer to Application” filed with Board by appellant, dated May 26, 1949 (R. 11-12), in which appellant gave notice that “The defendant will insist that all evidence must be adduced according to legal rules for the admission of evidence and that it is otherwise inadmissible, and will object to all ex parte evidence offered to prove or seek to prove any of the facts upon which the claimant bases his claim and the defendant will insist upon having a hearing before the full membership of the Board.” R. 12.

Appellant also served and filed its written objections further giving notice among other things as follows:

“4. That it contends that evidence must be adduced in a legal manner, and not ex parte, and is entitled to the right of cross-examination of all of claimant’s witnesses.” R. 20.

“5. That it demands a hearing before the full board with all members of the board present.”
R. 20.

“6. That the law does not authorize or permit a hearing to be held upon the extent of alleged temporary disability and a later hearing upon partial permanent disability.” R. 20-21.

“7. That claimant, has, if any, only one claim.”
R. 21.

“8. The Board has no power or authority to award both temporary disability and permanent partial or total disability and, if any permanent partial or total disability is awarded, then no temporary disability can be awarded.” R. 21.

Appellee Lathourakis gave his testimony by deposition (R. 21-33) before the full board on May 26, 1949. See Appendix B for proof of date.

Subsequently a hearing was held before the full board on August 30, 1949. For proof of date see Appendix B.

At the hearing Fred Sheils testified on behalf of appellee Lathourakis, which testimony was taken in the form of a deposition. R. 33-36.

In addition to the testimony of Lathourakis and Sheils, the board, over appellant's objections (R. 12, 20-21), considered and treated as evidence the unverified letters of Dr. L. E. Williams of May 20, 1949 (R. 37-38), and of March 23, 1949 (R. 116-118), and of Dr. Slyfield of February 23, 1949 (R. 112-115).

At the hearing the appellant offered the testimony by deposition of Dr. Thorburn S. McGowan (R. 40-81) and of Dr. A. Bernard Gray (R. 84-109), and also the stipulation between the parties that appellee Lathourakis worked as a gill net fisherman during the 1949 Bristol Bay salmon fishing season and was paid \$1,528.67, he and his fishing partner having caught 8400 fish. R. 111.

The full board on September 28, 1949, made its decision and award (R. 13-18), in which it found that appellee Lathourakis' temporary total disability continued from July 19, 1948, to May 20, 1949 (R. 16), and that he also sustained 50% of total permanent disability related to loss of earning capacity (R. 17), and that he was entitled to temporary total disability of \$3,833.55 for 315 days, less \$1,050.80 already paid him by appellant, plus interest at 8% per annum from date due until paid, plus permanent partial disability compensation of \$3,600.00 on the basis of 50% of total permanent disability for a married man. R. 17.

The Board also allowed appellee Lathourakis an attorney fee of \$1,100.00 (R. 18), but subsequently, at the hearing before the District Court, appellee Lathourakis tacitly admitted the error of this finding.

This \$1,100.00 fee has no relationship to the \$350.00 attorney fee which the District Court allowed to appellee Lathourakis for services of his attorney in the proceedings before the District Court. Point 7, R. 132.

Appellant appealed from the Board's decision to the District Court of the Third Judicial Division of

Alaska, within which Division the injury occurred, which Third Judicial Division transferred it to the First Judicial Division for trial. Complaint and Appeal, R. 3-8.

Appellant and the appellee Board stipulated that appellee Lathourakis might be made a party defendant in the cause before the District Court. R. 19.

Appellee Lathourakis filed his Answer (R. 19) in which he denied all of the allegations of Paragraph IX (R. 6-7) of appellant's "Complaint and Appeal", except subparagraph 4 thereof wherein appellant alleged that the Board had no power and authority to allow the aforesaid attorney fee of \$1,100.00, whereby he admitted appellant's contention in regard thereto.

Appellee Lathourakis made no denial of any of the allegations of the remaining Paragraphs of appellant's Complaint and Appeal; hence they as well as subparagraph 4 of Paragraph IX stood admitted at the hearing before the District Court, which treated appellee Lathourakis' Answer as a Demurrer to appellant's Complaint and Appeal.

The Alaska Industrial Board did not move or otherwise plead to appellant's Complaint and Appeal.

After a hearing (R. 112) before the District Court it rendered its written opinion (R. 119-123) on February 9, 1950, in which it held that appellee Lathourakis sustained total temporary disability for 307 days and also 50% permanent disability. R. 123.

The District Court entered its Judgment on March 24, 1950, allowing appellee Lathourakis total temporary disability compensation of \$2,005.00, which is in addition to the \$1,050.80 already paid by appellant to Lathourakis, and also the further sum of \$3,600.00 as 50% permanent disability compensation, together with interest thereon at 8% per annum from September 28, 1949, and also an attorney's fee of \$350.00. R. 125.

Thus actually the Judgment is that Lathourakis was allowed total temporary disability compensation of \$3,055.80 (\$2,005.00 plus \$1,050.80), not \$3,833.55 as allowed by the Board (R. 17), plus 50% permanent disability compensation of \$3,600.00, or a total compensation of \$6,655.80. R. 125.

On March 28, 1950, appellant filed its Notice of Appeal to this Court. R. 126.

It made and filed its Supersedeas on Appeal which was approved as to form, amount and sufficiency of surety by appellee Lathourakis and was approved and the appeal allowed on April 3, 1950, by the Judge of the District Court. R. 126-129.

Appellant served and filed its Statement of Points on April 18, 1950. (R. 130-132).

Appellant served and filed its Designation of Contents of Record on Appeal on April 18, 1950. (R. 133-135).

Appellee Lathourakis by designation included in the record the unverified ex parte letters of Dr. Slyfield of February 23, 1949, and of Dr. Williams of March 23, 1949. (R. 136).

C. FACTS.

Appellee Lathourakis, while in appellant's employ as a commercial fisherman during the salmon fishing season of 1948, at Bristol Bay, Alaska, in the Third Judicial Division of the District Court of the Territory of Alaska, on July 16, 1948, was injured by a collision between the fishing boat, which he then occupied and which was then being towed by a power boat, and the fish scow or barge to which the fish from the fishing boat were being taken for delivery. (R. 22; also R. 9).

Appellant at that time was engaged in the operation of a salmon cannery at Libbyville, Alaska, and had in its employ three or more employees, and admitted the relationship of employer and employee between it and Lathourakis. (R. 3-4).

Appellee Lathourakis' evidence consisted of testimony of himself (R. 21-33) and of his witness Fred Sheils (R. 33-36) and of Dr. Williams' unverified, ex parte letter to Attorney Jackson of May 20, 1949 (R. 37-38), and of March 23, 1949 (R. 116-118), and of Dr. Slyfield's unverified, ex parte letter to attorney Jackson of February 23, 1949 (R. 112-115).

Appellant's evidence consisted of the testimony of Dr. Thorburn S. McGowan (R. 40-81) and of Dr. A. Bernard Gray (R. 84-109).

The Board's decision and award was rendered on September 28, 1949 (R. 18), but notice thereof was not given to appellant until October 1, 1949 (R. 6), which filed its "Complaint and Appeal" with the

Clerk of the District Court of the Third Judicial Division on October 27, 1949 (R. 18), which Court transferred it to the First Judicial Division where it was filed November 2, 1949 (R. 2).

The District Court of the First Judicial Division entered final Judgment (R. 124-125) on March 24, 1950, for temporary total disability compensation of \$2,005.00, which is additional to the \$1,050.80 paid by appellant to Lathourakis prior to his filing his claim (R. 10), and for 50% permanent disability compensation of \$3,600.00.

QUESTIONS PRESENTED.

Appellant's "Statement of Points" (R. 130-132) makes seven points, upon which appellant relies, but which appellant believes present three questions.

None of these questions so far as appellant is informed has ever before been presented either to this or to the lower Court.

The first two of these questions were presented at the hearing before the Board by appellant's "Admission of Service and Answer to Application" (R. 11-12), and by its written Objections filed with the Board (R. 20-21) and in the District Court by appellant's "Complaint and Appeal", particularly by Paragraph IX thereof (R. 6-7) which Paragraph IX, except subparagraph 4, were put in issue by appellee Lathourakis' Answer. R. 19.

First—Appellant contends that the Workmen's Compensation Act of Alaska (Full text—Appendix A) does not authorize the Board to base its Findings, Decision and Award upon ex parte, hearsay, unverified, or other incompetent evidence.

This rule is supported by many decisions, hereinafter cited, and, inasmuch as the Board's Findings, Decision and Award were based solely upon ex parte, hearsay, unverified, or other incompetent evidence, those Findings were not conclusive upon the District Court; hence, it should have based its Judgment upon the only competent evidence that was adduced at the hearing before the Board and modified the Board's Findings to adjudge that appellee Lathourakis' temporary total disability ended October 1, 1948, and that he sustained no permanent disability as a result of the accidental injury upon which he based his claim.

Second—Appellant contends that the Workmen's Compensation Act of Alaska does not empower the Board to award to an injured employee for one and the same injury not only temporary total disability compensation but also permanent, either partial or total, disability compensation; hence, that the Board's Finding that appellee Lathourakis sustained both temporary total disability until May 20, 1949, and also 50% permanent disability and is entitled to not only temporary total disability compensation but also 50% permanent disability compensation, was not conclusive upon the District Court and should have been modified by the District Court, under the competent evidence adduced at the hearing before the Board, to

temporary total disability with compensation therefor until October 1, 1948.

Appellant concedes the absence of extensive judicial authority upon this point; but, submits that an analysis of the Workmen's Compensation Act of Alaska (Full text—Appendix A) shows that it does not authorize both total temporary disability compensation and permanent, either partial or total, disability compensation, to an injured employee for one and the same injury.

Third—Appellant contends that the District Court for the Territory of Alaska has no jurisdiction to allow, in a review before it on appeal of the Alaska Industrial Board's finding, decision and award, an attorney fee to the successful litigant in that appeal; hence, that the District Court erred in its Judgment (R. 125) in adjudging that appellant should pay appellee Lathourakis an attorney fee of \$350.00.

Appellant submits the Workmen's Compensation Act of Alaska (Full text—Appendix A) is a special procedural Act and that the only compensation payable to an injured employee is that specified by that Act; hence, that allowance of costs with "a reasonable attorney's fee to be fixed by the Court", under Section 55-11-55, ACLA 1949, Volume 3, is inapplicable; and that the payment of an attorney's fee of \$350.00 would constitute additional compensation which is not authorized by the Act.

This \$350.00 is not to be confused with the \$1,100.00 attorney fee included in the Board's award (R. 18),

the erroneous allowance whereof was conceded by appellee Lathourakis by not denying in his Answer (R. 19) subsection 4 of Paragraph IX of appellant's "Complaint and Appeal" (R. 7).

This question was raised by oral exception to the Judgment and by serving and filing appellant's Statement of Points. (Point 7, R. 132).

ARGUMENT.

(A) AWARD MUST BE BASED UPON COMPETENT EVIDENCE.

Question 1 (Points 1-5, R. 130-131).

As early as May 26, 1949, both the Board and the appellee Lathourakis were informed by appellant by demand therefor made by the latter in its Answer (R. 12) that appellant would insist that all evidence be adduced according to legal rules for the admission of evidence or that it would otherwise be inadmissible and would object to all ex parte evidence offered to prove or seeking to prove any of the facts upon which the appellee Lathourakis based his claim.

Appellant also served and filed on June 27, 1949, its written Objections to the same effect. (R. 20-21).

The Board's Findings that appellee Lathourakis had been totally temporarily disabled from July 19, 1948, to May 20, 1949, (R. 16) and entitled to 315 days total temporary disability compensation (Award, R. 17), reduced by Judgment to 307 days and from \$3,833.55 to \$3,055.80 (\$2,005.00 plus \$1,050.80) (R. 125) and had suffered 50% permanent disability and

was entitled to permanent partial disability compensation of \$3,600.00 (R. 17), affirmed by Judgment (R. 125), are not based upon any legal or competent evidence.

To the contrary they were both based upon either *ex parte* or hearsay evidence.

Appellee Lathourakis' only evidence was his personal testimony (R. 21-33), the personal testimony of layman Fred Sheils (R. 33-36) and the unverified, *ex parte* letters to Lathourakis' attorney of Dr. Williams of May 20, 1949 (R. 37-38) and of March 23, 1949 (R. 116-118), and of Dr. Slyfield of February 23, 1949 (R. 112-115).

Without conceding the credibility of or any probative weight to the testimony of either Sheils or Lathourakis, we assume, for the purposes of the argument, that a person claiming an injury, even though a layman, may properly testify that he is still partially or totally disabled from performing his work; also that a lay witness may properly testify from personal knowledge to the manner in which a person, who claims to have been injured, does his work after the receipt of the claimed injury.

But, both Lathourakis and Sheils were laymen, and while doubtless they could properly testify, for instance, that they saw that Lathourakis' right forearm was swollen or black and blue on a particular day or days, or to any other objective injury, and Lathourakis himself could testify that he suffered pain, weakness, or physical impairment, and a lay witness, who witnessed it, could testify that Lathourakis by

his conduct or expression evinced pain or suffering, yet, being laymen, the testimony of neither is admissible to prove subjective injuries, such as are claimed here, the character, extent and future effect of which can be only known to experts in human anatomy, or that Lathourakis' physical condition at the time he testified was caused by his claimed injury; hence, no inference can be properly based upon such if any testimony as they did give, that any subjective symptoms of which Lathourakis claimed to be suffering at the time of giving his testimony, were due to his accident.

Lathourakis in his "Application for Adjustment of Claim", claims, in Question 1, "crushing injury to right arm, and severe injury to chest, esophagus and abdomen," and in Question 9 "injury to arm, chest, and esophagus." (R. 9-10.)

Nowhere does he claim any objective injury, nor is there any evidence of any objective injury such as a black eye, a broken arm, a mashed finger, other than the temporary discoloration, swelling, and bruising of his right forearm.

He signed his Application on April 13, 1949, (R. 10) subsequent to the writing of the letters of Dr. Slyfield of February 23, 1949, (R. 112-115) and of Dr. Williams of March 23, 1949, (R. 116-118), of which letters undoubtedly Lathourakis had knowledge inasmuch as they were written to his attorney, when he so signed his "Application for Adjustment of Claim."

His claim is actually premised (R. 25) upon his having suffered subjective or internal injuries, none

of which disclosed their presence upon the surface of his body where they would be the object of a witness' eyes.

Only an expert in human anatomy is qualified to testify as to the character, extent and future effect, if any, of the internal injuries he claims to have suffered.

“Where, however, the injuries or pain are subjective and of such a character that laymen cannot know with reasonable certainty the cause, extent, or their future effect, then there must be offered evidence by expert witnesses, learned in human anatomy, who can testify from a personal examination or from knowledge of the history of the case or from a hypothetical question based on the facts as to the matter involved in the suit.”

Schwartz Trial of Automobile Cases, Second Edition, Pages 429, 430;

Sickmund v. Conn. Co. (Conn.) 189 Atl. 876;

Shawnee-Tecumseh Traction Co. v. Grigg, (Okla.) 151 P. 230.

If this were not the rule there would be no sense in calling a medical expert or qualifying him as such for his testimony.

The distinction is perhaps no better shown than that a layman can testify as to another's evincing pain, but he is not qualified to testify whether that expression of pain is feigned or real. A medical expert must be called to testify to that. The layman can only testify to the facts as he observes them.

Pierson v. Ill. C. R. Co., 123 N.W. (Mich.) 576.

Neither Lathourakis nor Sheils was qualified to state whether the condition in which Lathourakis claimed he was in on May 26, 1949, (the date on which he testified before the Alaska Industrial Board, See Appendix B), or his working ability in the summer of 1949 to which Sheils testified, was the result of the injury Lathourakis claims to have received on July 16, 1948.

The point is that a layman has no such knowledge of human anatomy as to be able to do anything but guess as to the cause of a subjective symptom.

Thus, remote and unusual effects of physical injuries such as cancer or tuberculosis would call for more than a layman's knowledge of cause and effect.

Hickenbottom v. D. L. & W. R. R. Co., 25 NE (NY) 279;

Schwartz Trial of Automobile Cases, Second Edition, page 453.

Having in nowise qualified himself as an expert in human anatomy, Lathourakis' testimony, either direct or implied, that his present condition is the effect of his injury is nothing more than surmise, and his opinion is incompetent.

“A person injured may testify to the effects of an injury or operation upon him, and what is the resulting condition, provided that, unless he is an expert his answer states only facts of knowledge and consciousness, and not opinions, requiring professional skill to form justly.”

Abbott on Facts (Vesselman's 5th Ed.) P. 1227, Sec. 857.

Abbott on Facts cites the following cases in support of his thesis, i.e.:

One, not an expert, cannot testify that the effect of a blow on his ear was to produce deafness.

Stevens v. Rodger, 25 Hun. (N.Y.) 54, and

One, not an expert, cannot testify that his head will never be the same as it was.

Pfau v. Alteria, 52 N.Y.S. 88.

Abbott on Facts further states:

“The opinions of medical experts as to the causes of death, injury, or other particular physical condition are admissible as evidence upon the ground that such witnesses have *peculiar knowledge or skill* with reference to the particular subject matter in question. Such opinions are therefore admissible where they are *inferences of skill* derived either from observation or from *scientific deductions* from given facts. So, an *expert* who has examined an injured person or the body of one deceased may state *his opinion* as to what was the cause of the wound or other injury thereon or the cause of death.” (Emphasis supplied).

Abbott on Facts (Vesselman’s 5th Ed.) P. 375, Section 256 (d).

The testimony of Lathourakis and his witness Sheils was thus incompetent because of their incompetency to testify as to the extent, duration and cause of his physical condition, thus reducing Lathourakis’ evidence to the two unverified, ex parte letters of Dr. Williams of March 23, 1949, (R. 116-118) and of

May 20, 1949, (R. 37-38), and of Dr. Slyfield of February 23, 1949. (R. 112-115).

Patently the statements in the first three paragraphs (R. 113) of Dr. Slyfield's letter of February 23, 1949, were hearsay. He is repeating nothing more than what appellee Lathourakis told him.

This examination by Dr. Slyfield was made on February 17, 1949. (R. 112).

From such physical examination as Dr. Slyfield then made of appellee Lathourakis he concluded that Lathourakis "looks fairly well and does not appear to be in any distress". (R. 114).

He also stated that Lathourakis' complaints of pain in the left thorax and shortness of breath on walking were presumably the result of the necessary surgery (R. 114) and that the fluoroscope showed there was still some constriction in the upper esophagus and a widening in the lower part (R. 114) and intimated that he approved the finding by somebody, not mentioned, of markedly thickened esophageal wall. (R. 115).

The last paragraph of Dr. Slyfield's letter (R. 115) also is clearly hearsay, seemingly founded upon what appellee Lathourakis told Dr. Slyfield, and his conjectured opinion is based upon that hearsay.

Dr. Slyfield's letter nowhere indicates nor do the records disclose any evidence, that his examination of appellee Lathourakis was made in the capacity of a physician being consulted by a patient for the pur-

pose of securing medical aid to alleviate his condition, but that examination was nothing more than an effort to obtain medical testimony, based upon appellee Lathourakis' statements to the physician, to bolster up appellee Lathourakis' claim as to the extent and duration of his injury. (R. 112).

Dr. Williams' letter of March 23, 1949, specifically admits that his examination of appellee Lathourakis on March 22, 1949, was not that of a physician seeking to prescribe for his patient but solely to determine on that date what disability appellee Lathourakis had suffered from his accident of July 16, 1948. (R. 116).

Except for such actual physical knowledge as Dr. Williams had gained by personally examining appellee Lathourakis, the statements in his letter also are based entirely upon hearsay, apparently upon oral statements made to him on March 22, 1949, by Lathourakis. (R. 116-118).

Dr. Williams did not hesitate to state that the "examination shows that he has lost about 45 pounds since the operation and has regained about 20 pounds in the past two months." (R. 117). Dr. Williams, however, failed to explain how an examination made on March 22, 1949, could possibly show that appellee Lathourakis had lost 45 pounds since October 11, 1948, but had regained 20 pounds since January 23, 1949.

Dr. Williams further stated that appellee Lathourakis had suffered permanent disability of 65% resulting from a chest injury sustained on July 16, 1948, and the subsequent necessary surgical work, and also

20% of the amputation value of the major upper extremity of the major forearm at the elbow. (R. 117-118).

He further said that in making those ratings he had taken into consideration that the appellee Lathourakis would regain some strength of grip in the forearm with increased use and some improvement of the present state of general weakness would ensue. (R. 117-118).

He further said "otherwise, I feel that his condition is fixed at this time." (R. 118).

Although the record does not disclose that Dr. Williams had anything before him except appellee Lathourakis' oral statement and an X-Ray from some undisclosed source, he concluded by stating that "The man has been totally disabled from work since the date of injury and is still disabled for any but the slightest work." (R. 118).

Dr. Williams' later letter of May 20, 1949, (R. 37-38), also shows that that examination was not made because of a patient consulting a physician for medical relief but for purposes of bolstering up appellee Lathourakis' claim for compensation.

The statements in this letter are also based upon hearsay statements made to Dr. Williams by appellee Lathourakis. (R. 37). Dr. Williams did not in this letter attempt to compare the condition of appellee Lathourakis as disclosed on May 20, 1949, by that examination, with that disclosed by the examination on March 22, 1949, (R. 116-118) even in such a matter

as weight. Dr. Williams gives no basis of comparison as to the gain or loss in weight by Lathourakis during the intervening two month period.

He again rates Lathourakis as having suffered 65% unspecified permanent disability for his chest and upper abdominal condition and general physical weakness, but increases the rating as to the forearm up to 25% (R. 37-38); but confesses that "It would be more satisfactory to rate this man's disability after he has attempted fishing. At this time it hardly appears that he will be able to develop the strength and endurance and eat enough food to enable him to do the work." (R. 37).

Seemingly on May 20, 1949, appellee Lathourakis planned and so told Dr. Williams of his intention to re-engage in the occupation of fishing during the ensuing salmon fishing season, in which occupation he did engage (Stipulation, R. 111) and was actually the sixth or seventh high boat out of twenty-one boats fishing for his employer that season. (Sheils' Deposition, R. 36).

Repetition of statements made by Lathourakis to Drs. Williams and Slyfield, because they were Doctors are no more admissible than though they were laymen, and are inadmissible under the hearsay rule that such statements are not admissible unless brought within some exception, such as being part of the *res gestae*, of the hearsay rule. These particular statements disclose that they do not come within any exception to that rule.

Lathourakis' statements to those Doctors on the occasions reported upon by them in their letters were not involuntary exclamations of pain by Lathourakis. Neither were they declarations made to those physicians so that the latter could prescribe curative remedies to him.

His statements made to them and used by them in writing those letters we submit is within the rule, namely:

“A clear distinction is drawn, however, between involuntary exclamations of pain and evidence of simple declarations by the plaintiff made some time after the injury that he was then suffering pain. Such evidence is of a totally different nature, the likelihood of gross exaggeration being so much greater. Evidence of complaints of pain is therefore inadmissible unless made to a physician for the purpose of receiving treatment.”

Schwartz Trial of Automobile Accident Cases,
(2d Edition), page 438,

citing:

Roche v. Brooklyn C. & N. R. Co., 105 N.Y. 294;

West Chicago S. R. Co. v. Kennelly, 48 N.E. 996;

Cashin v. N. Y., N. H. & H. R. Co., 70 N.E. 930;

Sund v. Chicago R. I. & P. Co., 204 N.W. 628;

Davidson v. Cornell, 132 N.Y. 132, 228, 237.

This rule is also expressed:

“Declarations made by one injured to his attending physician are admissible when they relate

to the part of his body injured, his suffering symptoms and the like; but, *not if they relate to the cause of the injury*. This rule is more rigorously applied to lay witnesses. *Chicago & A. R. Co. v. Industrial Board*, 113 N.E. 629.” (Emphasis supplied).

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 A.L.R. 543.

Also:

Shaughnessy v. Holt, 86 N.E. (Ill.) 256, annotated in 21 L.R.A. (N.S.) 826.

However, Dr. Williams' letter of May 20, 1949, (R. 37-38), is the only basis of the Board's finding that Lathourakis' total temporary disability continued until May 20, 1949. (Award, R. 16).

That letter contains not a single statement or even intimation pertaining to total temporary disability, or that on May 20, 1949, Williams found that Lathourakis' previous temporary disability had become fixed at 50 per cent unspecified permanent partial disabilities. (Williams' letter, R. 38). The words "at present" do not admit or deny that those unspecified permanent partial disabilities may have become fixed days, weeks, or months previous to May 20, 1949, and his total temporary disability ended those same days, weeks, or months prior to May 20, 1949; in fact, on March 23, 1949, Dr. Williams thought Lathourakis' condition, except for some further improvement, had then become fixed. (R. 118).

The sentences, "It would be more satisfactory to rate this man's disability after he has attempted fishing. At this time it hardly appears that he will be able to develop the strength and endurance and eat enough food to enable him to do the work," (R. 37) indicate that Dr. Williams himself did not know whether Lathourakis' temporary disability had ended or any partial permanent disability had become fixed or apparent. They do indicate, however, that on May 20, 1949, Lathourakis told Dr. Williams that he intended to go fishing during the ensuing fishing season although six days later in giving his testimony before the Board he intimated that he would be unable to fish during that season. (R. 27; also R. 29).

Nor was there any competent evidence before the Board, as we shall show *infra*, that Lathourakis' total temporary disability ended on any date other than on October 1, 1948.

The general rule is,

"Where medical proof is required, it must be furnished either by producing the doctor for examination and cross examination or by his deposition taken pursuant to law. The Doctor's unverified report or declarations not made in Court, will be insufficient."

Schwartz Trial of Automobile Cases, Second Edition, page 430,

citing:

Lindquist v. Triedelson, 248 N.Y. Suppl. 775;
Francisco v. Circle, etc. Co. (Ore.) 265 P. 801;
Godkin v. Brooklyn, etc. Corp. 269 N.Y. Suppl. 809.

This rule is not obviated because this hearing is under the Alaska Workmen's Compensation Act which provides:

“ Process and procedure under this Act shall be as summary and simple as reasonably may be ”

Section 43-3-14, ACLA 1949, Volume 2.

“ . . . The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner . . . ”

Section 43-3-15, ACLA 1949, Volume 2.

The Act nowhere sanctions the use of incompetent or hearsay evidence upon which to base the Board's findings.

To the contrary, the Act empowers the Board to administer oaths.

“ . . . The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute . . .

“ The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. ”

Section 43-3-14, ACLA 1949, Volume 2.

What sense or consistency could there be to administer an oath to either an employer or an employee if

he personally appeared to testify before the Board, and on the other hand to consider as evidence an unverified, ex parte letter written by either an employer, an employee, or even a physician, which he mailed or handed to the Board?

The use of such unverified, ex parte letters by either employer or employee can only lead to fraud, deceit and lies, without opportunity to the other to expose such fraud, deceit and lies by cross-examination.

The Act also provides:

“When an application for review is made, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable . . .”

Section 43-3-16, ACLA 1949, Volume 2.

These and other provisions of the Act plainly indicate its intent that the hearing shall not be a Star Chamber proceedings, but shall be held, though summarily, in an orderly, legal, quasi-judicial manner.

The language of the Act, namely:

“Process and procedure under this Act shall be as summary and simple as reasonably may be.”

Section 43-3-14, ACLA 1949, Volume 2.

is not peculiar to Alaska. It is found in workmen's compensation statutes of various other jurisdictions. That language has been stated by an authoritative work on Workmen's Compensation Laws to bar hearsay.

“Other state legislatures did not abolish all common rules” (for workmen’s compensation hearings). “They provided that ‘Process and procedure should be as simple and summary as reasonably may be.’ Procedure was simplified. Simple forms were used. The mail replaced the sheriff. Hearsay was taboo and should not even be admitted in evidence.”

Horovitz Injury and Death under Workmen’s Compensation Laws (1944), Page 242.

Even in jurisdictions where the administrative tribunal of such statutes may dispense with the technical rules of evidence, an evidentiary rule of substance is often retained.

“It is manifest, however, that the rule against hearsay is not technical but vitally substantial and may not properly be disregarded under such statutory provisions without grave danger of collusion, imposition, and injustice. If a claimant be permitted to make out a case upon the essential facts of accidental injury upon hearsay testimony alone, there is no limit to the frauds and wrongs that may be encouraged and made possible.”

Lallier Construction Co. v. Industrial Commission, 17P2 (Col.) 534.

American Jurisprudence says:

“It may be stated as a general rule that, in the absence of any statutory sanction therefor, hearsay evidence is not admissible in a proceeding before a compensation board or commission, unless it falls within one of the established exceptions to the rule of exclusion.”

58 *Am. Jur.* 863, Sec. 445.

citing an Illinois decision which held not only that hearsay was inadmissible but also that evidence was inadmissible where the adverse party had been denied the right of *cross-examination*, viz.:

“The sole question raised in this case is whether or not there is any competent evidence in the record showing that the death of Cloyes was caused by an injury which arose out of and in the course of his employment. The oral testimony bearing upon that question, heard before the arbitrator, and the Industrial Commission over the plaintiff in error’s objection, was hearsay and incompetent. That testimony consisted of statements of the witnesses of what the deceased told them about when, where, and how he received the injury, and what he was doing at that time. No one testified who had any knowledge of those facts, except from the statements made to them by the deceased. Declarations made by one injured to his attending physician are admissible when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury. This rule is more rigorously enforced when applied to lay witnesses. *Chicago & A. R. Co. v. Industrial Board*, 274 Ill. 336, 113 NE 629.

* * * * *

“It is a well-known and well-recognized rule that the evidence of a witness or witnesses, dead or alive, in any suit, although prosecuted to final judgment, is not admissible against any third party in another suit who was not a party to such judgment. The main ground upon which this rule is based is that such third party had no right of cross-examination of such witness or witnesses.

The evidence of witnesses before the coroner's jury, dead or living, is not admissible against either party in a civil suit for damages, and for the same reasons above given. *Pittsburgh, C & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N.E. 439; *Knights Templars' & M. Life Indemnity Co. v. Crayton*, 209 Ill. 550, 70 N.E. 1066. If the evidence of the witnesses before the coroner's jury is not receivable against a party in the civil suit growing out of the death of the party over whose body the inquest is held, and the judgment and findings of a court in another suit concerning the same death are not admissible, there is no sound reason, in our judgment, why the inquest of a coroner ought to be admissible to prove, *prime facie* or otherwise, any issue in such case."

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. (Ill.) 606, 6 ALR at Pages 543, 546, 547.

also citing:

Reck v. Whittlesberger, 148 N.W. (Mich.) 247.

The California Court has also held:

"An award based merely on hearsay evidence cannot be sustained."

Employers, etc. v. Industrial A. C., 151 P. 423.

The Annotation on Workmen's Compensation LRA 1916(A), Page 267, states:

"Nor, according to the weight of authority, can it" (the Board) "base an award on hearsay evidence only,"

citing the foregoing cases of:

Reck v. Whittlesberger, 148 N.W. 247;

Employers, etc. v. Industrial A. C., 151 P. 423.

The language of the New York Act providing that the Commission shall not be bound by common-law or statutory rules of evidence, or by technical rules of procedure and may make its investigation in such a way as to ascertain the substantial rights of the parties—which language is much broader than that of the Alaskan Act—has been held not to mean that the Commission may base an award upon hearsay evidence alone. While the New York Act allows the admission of hearsay evidence, there must be legal evidence in support of an award.

Carroll v. Knickerbocker Ice Co., 113 N.E. 507, which reversed the previous decision in that case in 155 N. Y. Supp. 1, L.R.A. 1916A, at Page 268, note 9.

It will be noted that the Board's Award herein has no legal evidence whatever to support its Findings.

The Maryland statute, similar to that of New York, was construed similarly to the New York Act.

“The first three exceptions were against the admission of the testimony of Mrs. Traylor and Mrs. Carey as to Traylor's statements when he was sick on his return from work, on occasions prior to the last that he had been gassed at the plant. In *Standard Oil Co. v. Mealey*, 147 Md. 252, 127 Atl. 851, it is said in the opinion delivered by Chief Judge Bond: ‘Divergent views have been entertained in other jurisdictions on the relaxation by a Court of its ordinary rule for excluding hearsay evidence on review of compensation cases. . . . In New York, where the statutory provisions for the relaxation of rules of evidence before the Commission is the same as

that in the Maryland Act, hearsay testimony is received in court reviews, but an award is not permitted to be based on such testimony alone. *Carroll v. Knickerbocker Ice Co.* 218 N.Y. 435, 113 N.E. 507, Ann. Cas. 1918B, 540; *Belcher v. Carthage Mach. Co.* 224 N.Y. 326, 120 N.E. 735; *State Treasurer v. West Side Trucking Co.*, 233 N.Y. 203, 135 N.Y. 244; *Hansen v. Turner Constr.* 224 N.Y. 331, 120 N.E. 693. And to the same effect are *Kelley's case*, 123 Me. 261, 122 Atl. 580; *Royal v. Hawkeye Portland Cement Co.*, 195 Iowa, 534, 192 N.W. 406; *Reck v. Whittlesberger*, 181 Mich. 463, 148 N.W. 247, Ann. Cas. 1916C, 771, 5 N.C.C.A. 917; *Garfield Smelting Co. v. Industrial Commission*, 53 Utah 133, 178 Pac. 57; *Rockefeller v. Industrial Commission*, 58 Utah 124, 197 Pac. 1038; *Valentine v. Weaver*, 191 Ky. 37, 228 S.W. 1036; *Riley v. Carnegie Steel Co.*, 276 Pa. 82, 119 Atl. 832.' * * * *'

Bethlehem Steel Co. v. Traylor, 148 Atl. 246, 73 ALR 479, 483.

The Michigan Court held, to make the facts found by the Board conclusive, they must be based upon competent legal evidence, and not on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence.

Reck v. Whittlesberger, 148 N.W. 247.

Such also is the rule laid down by American Jurisprudence, viz.:

"It is sometimes provided in compensation acts that the finding of the administrative tribunal as to certain facts or issues shall be final, or that findings of fact generally, in the absence of fraud,

shall be conclusive. Such a provision is operative, however, only where the finding is supported by evidence.”

58 *Am. Jur.* 882, Sec. 483.

The Alaska Act on this topic reads:

“An Award by the full Board shall be conclusive and binding as to all questions of fact; but, either party to the dispute, within 30 days from the date of such award, if the award be not in accordance with law, may bring injunction proceedings, mandatory, or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award.”

Sec. 43-3-22, ACLA 1949.

Appellee Lathourakis having adduced no evidence at the hearing to support the Board's findings, they are neither conclusive nor binding, and the lower Court should have set them aside.

The Illinois court so held under similar language of its act.

“If the coroner's verdict in this case is held to be competent evidence, it is as clear as any proposition can well be made that plaintiff in error is to be held liable upon the declarations of Cloyes, now deceased, made at a time when he was a real party in interest and in his own interest, and without the sanction of an Oath, and under circumstances that the declarations could not possibly be met or refuted by plaintiff in error by other evidence, or even by the right of cross-examination. This is so because the circuit court and this Court, under our Compensation Act, can only pass upon

questions of law, and cannot reverse the order of the Industrial Commission for insufficiency of the evidence, unless we can say that there is no competent evidence in the record tending to support such order. It is equally clear that there was no competent evidence before the coroner's jury or the Industrial Commission showing or tending to show that the injury to the deceased arose out of and in the course of his employment, unless we hold that the unsupported verdict of the coroner's jury is competent evidence for such purpose. Plaintiff in error was not a party to the proceedings before the coroner's jury, was not present and had no right to be present or represented in that proceeding, had no choice or right of choice in the selection of the jury, did not cross-examine and had no right to cross-examine the witnesses before that jury, or to contradict the evidence tending to prove the liability against it which it is claimed the verdict of that jury now establishes. To hold that that verdict has that effect is to condemn plaintiff in error without a hearing, and to violate the most elementary and sacred rules for the administration of justice between private individuals, guaranteed by our laws and our Constitution, both state and national."

Spiegel's House Furnishing Co. v. Industrial Com., 123 N.E. 606, 6 ALR 543;

Libby, McNeill & Libby v. Board, 11 AR 327, 333.

This doctrine is also at least impliedly sustained in *Phillips v. Industrial Commission*, 61 NE 2d (Ill.) 681, 172 ALR 372, 377.

Appellant contends that even Lathourakis' incompetent evidence does not show his temporary total disability continued until May 20, 1949, and that, in any event, the Board's finding is not conclusive upon this or the lower Court unless it is based upon the weight of competent evidence.

(B) COMPETENT EVIDENCE PROVED APPELLEE LATHOURAKIS SUFFERED NO PERMANENT DISABILITY FROM HIS INJURY.

Question 1 (Points 1-5, R. 130-131).

The two unverified letters of Dr. Williams and the one unverified letter of Dr. Slyfield constitute all of appellee Lathourakis' medical expert evidence.

**Dr. Thorburn S. McGowan's Deposition.
R. 40-41.**

The appellant adduced on its behalf by deposition the medical expert evidence of Dr. Thorburn S. McGowan (R. 40-81) and of Dr. A. Bernard Gray (R. 84-109), both of whom were subjected to rigid cross-examination by appellee Lathourakis' attorney. (McGowan Cross-Examination, R. 59-75; Re-Cross Examination, R. 77-80, also 81; Gray Cross-Examination, R. 93-107).

Dr. McGowan was entirely disinterested and was the surgeon of the Surgical Services in the United States Marine Hospital of the United States Public Health Service, Seattle. (R. 40).

He performed the operation. (R. 48).

He testified that the operation was an exploratory thoracotomy and an exploration of the mediastinum and upon the esophagus. (R. 49-50; also 54).

Dr. McGowan testified that the chest and the right arm would have equal recuperative qualities under a blow of equal force; that he didn't think that a blow to the chest, which did not injure any of the organs in front of the esophagus, could have resulted in the condition which he found in Lathourakis' esophagus for the reason that in his experience any severe blow to the chest should cause first a fracture of the ribs or sternum, and that the esophagus is the most protected organ in the chest and is surrounded by other organs and by loose tissue which would take up any actual blow; that Lathourakis had no such fractures; that it is not conceivable for the esophagus to be directly injured by any external blow unless the blow penetrates the chest; that in his opinion Lathourakis' vomiting and regurgitation, after the injury, did not cause the condition which he found in Lathourakis' esophagus, and that the thickness of the walls of Lathourakis' esophagus which was found three months from his injury could hardly have developed into such a condition if not already pre-existing.

That Lathourakis has in his esophagus the same kind of glands that are normally present in the stomach, which is the reason why he can get the equivalent of a stomach ulcer in his esophagus. Those glands have been present to a certain degree from Lathourakis' birth, and would not have been caused by the blow or by Lathourakis' vomiting after the accident; they were present congenitally; that the

conditions so found upon the thoracotomy sufficiently explained the condition of the stricture and Lathourakis' difficulty in swallowing food which is another reason why he felt the blow in July, 1948 did not cause the condition. Lathourakis definitely had a strictured condition which was present when he was first examined by Dr. Webber in August, only one month or less than a month from the time he was injured. Even when people swallow caustics such as lye, a stricture rarely develops that rapidly. A complete stricture rarely develops that rapidly. So obviously I feel he had had this condition for a considerable period of time. Furthermore, the stricture develops because scar formation has to occur, which scar formation occurs slowly and because of that I feel that the process had been going on for a considerable period of time. The body tries to repair the ulcer and a scar results. Then over a considerable period of time the scar contracts and you get what we call a stricture or a narrowing of the esophagus. (R. 54-57).

He also testified:

“Q. Assuming that we have a compression of the upper abdomen following an accident such as Mr. Lathourakis had, and this forced the gastric contents from the stomach into the esophagus, and you had a narrow esophagus at that particular point. Wouldn't such a happening aggravate this abnormal condition that you spoke of, that has existed in the lower end of the esophagus?

A. Only temporarily, sir.

Q. But it would aggravate it?

A. I think to a certain extent, for a matter of a day or so, yes.” (R. 65).

He also testified:

“Q. I think you have spoken of esophagitis?

A. That is an inflammatory affair; that is an inflammatory affair in the lining of the esophagus.

Q. Would you expect to find esophagitis following such an accident?

A. If he had a normal esophagus, you would except to find a temporary, acute flare-up, but not the chronic condition that we found in his case, sir.

Q. Now, if you superimpose the fact of the abnormal esophagus a further strain,—a further strain upon the already weakened wall in the esophagus, then you would have a worse condition than would have been produced otherwise; isn't that true?

A. I don't believe so, sir. For instance, you say, 'A strain upon the already weakened wall in the esophagus.' I don't think that the wall was weakened at all. The wall was contracting down; it was cutting down; it was thicker than usual, but it was not a weakened wall." (R. 66-67).

He also testified:

“Q. Can you say that a crushing blow such as Mr. Lathourakis had to his chest did not compress his upper abdomen? Can you say that?

A. I feel, if it had, he should have had some evidence of injury there, which apparently no one has found.

Q. What evidence would you find?

A. I think you should find bruising of the upper abdomen. You might find a scratch, if it had been abraded. I think you would be expected to find it very sore; and his complaint to the

doctors and to me was about his chest, and he didn't complain of his abdomen hurting.

Q. Did he tell you that he was black and blue in the chest and in the arm?

A. He said his chest was discolored, and that his arm was discolored." (R. 67-68).

He also testified:

"Q. Then a lot depends on the extent of the blow that you have to the chest and upper abdomen.

A. I disagree with you there. You are talking about the upper abdomen. A blow to the chest, I don't believe, will rupture the esophagus. I don't think it will rupture the esophagus until it has broken many ribs, and until it has very probably ruptured other organs. Actually you will find you get punctured lungs, and that you would get damage to other organs before you would get damage to the esophagus." (R. 69).

He also testified:

"Q. Do I understand that you take the position that Mr. Lathourakis did not have a blow following this accident to the upper abdomen?

A. In my opinion sir. The history which he gives to some five or six various people here in no place refers to a blow to the upper abdomen. He told me personally that he struck his chest and right arm. I don't know anything about a blow to his upper abdomen, because he has never complained to me about it." (R. 70).

Dr. McGowan's testimony throughout positively shows that in his opinion appellee Lathourakis' in-

jury did not cause the condition in his esophagus for which the operation was performed.

He further testified that such permanent disability as Lathourakis would suffer was due to the operation, not to the injury, and furthermore that that permanent disability, upon full convalescence, would be between 20% or 30%, (not 50% as found by the Board).

By this testimony Dr. McGowan upon oath disputed and contradicted the unsworn ex parte letters of Drs. Williams and Slyfield, neither of whom, according to the records, ever had treated or examined appellee Lathourakis as a patient, but simply for the purpose of bolstering up Lathourakis' claim against appellant, whereas Lathourakis as a seaman was McGowan's patient as a United States Public Health Service surgeon. (R. 45).

Dr. McGowan testified:

“Q. Doctor, when Mr. Lathourakis has completely convalesced, if he had not at the time you saw him, would you give any opinion as to any permanent disability which would remain to him?

A. Yes sir. I think Mr. Lathourakis will have a definite partial disability which will include an inability to do certain types, or, rather, to eat certain types of food which may produce more gas than usual, and the possibility that he may develop further ulcerations of any abnormal glands which he has.

Q. In terms of a man being able to work, could you give us any percentage?

A. I would rate Mr. Lathourakis at the present time, or, excuse me, at the time of his com-

plete convalescence as being between twenty and thirty percent disabled.

Q. How much was he disabled when you saw him last?

A. At the present time I could not tell you, but I could get it from the records, if you would be interested, sir.

Q. You do not know at the present time?

A. At the present time, sir, I have not seen him for, I think, at least a month; so I could not tell you what his disability is.

Q. But you would assume that it would be more than twenty or thirty percent?

A. Yes.

Q. Around thirty to forty?

A. I would assume it would be around forty percent." (R. 80-81).

Dr. McGowan's testimony was corroborated by Dr. A. Bernard Gray whose testimony was given by deposition, subject to cross-examination. (R. 93).

Dr. McGowan testified positively that in his opinion appellee Lathourakis' condition was not due to any blow received in the accident. (R. 56-58; also R. 61; also R. 70; also R. 79-80).

Dr. McGowan also testified that in his opinion appellee Lathourakis suffered some *permanent disability from the operation* (R. 52) which he estimated upon complete convalescence as being between 20% to 30% (R. 80-81) and that at the time of the giving of his deposition on July 7, 1949, at around 40%. (R. 81).

Dr. A. Bernard Gray's Deposition.**R. 84-109.**

Dr. A. Bernard Gray who also gave his deposition (R. 83-110) was the physician furnished by the appellant. (R. 106).

Dr. Gray is an experienced orthopedic and traumatic surgeon, engaged in practicing his specialty in Seattle since 1945 and having served as attending orthopedic surgeon for three years at the Permanente Foundation Hospital in Oakland, California, where he had charge of the section handling fractures and injuries, being in charge of two hospitals totaling approximately 400 beds. (R. 85). He was first consulted by appellee Lathourakis on July 26, 1948, ten days after the latter's injury on July 16, 1948. Lathourakis told him that his right hand and arm had been caught between the mast and the barge and his forearm had become very painful, swollen and discolored; also that he had been struck over the chest by the mast, but since then he had had no pain but had difficulty swallowing heavy foods, especially meat. (R. 86).

On that occasion Dr. Gray stated that at that time he had an X-Ray taken of Lathourakis' right arm which was encased in a short plastic cast; but the X-Rays revealed no evidence of fracture but that the forearm bones were intact, so the cast was removed; but that the forearm was extensively swollen showing many areas of healing abrasions and of patchy discoloration. The swelling extended from the fingers to above the elbow. Tenderness which was present

throughout was extensive and was marked. There was about 50% limitation of finger and wrist joint motion. There was muscle weakness. (R. 86-87). Dr. Gray further stated that he examined Lathourakis' chest wall and there was neither discoloration nor local tenderness. (R. 87).

Dr. Gray stated he thought that Lathourakis' complaint of inability to swallow meat was made to him by Lathourakis on the second day and after he had finished his original examination. (R. 88; also R. 94).

Lathourakis' complaint of inability to swallow meat caused Dr. Gray to feel the complaint should be investigated further and that X-Ray studies should be made of Lathourakis' esophagus, which X-Rays were taken revealing an organical lesion which had the appearance of carcinoma. (R. 88).

Dr. Gray then referred the patient to Dr. Julius Webber. (R. 88).

Those clinical X-Ray findings were such that Dr. Gray felt that Lathourakis should have surgical treatment to the esophagus and he referred him to a specialist along those lines. Arrangements were finally made that Lathourakis should go to the Marine Hospital. (R. 88; also R. 100-101).

Dr. Gray was of the opinion that the condition of the esophagus was unrelated to the injury and he so advised Lathourakis and suggested to him that he would have to seek medical care of his own. (R. 89). Dr. Gray reiterated that no X-Rays were taken of

the chest, that there were no local signs of injury or tenderness to indicate the necessity of taking X-Rays of the chest, but that X-Rays were ordered of the esophagus.

He further stated:

“Q. Now, did you have something further to say, or did I interrupt you in your diagnosis and opinion?”

A. Yes. I made an opinion, as I felt that I was entitled to make an opinion despite the fact that I am not a specialist in the diseases of the esophagus. I based my opinion mainly on two things.

In the first place, I have seen innumerable injuries to the chest, and I have never seen a complication involving the esophagus.

In the second place, there was no objective evidence when I examined him ten days after the injury, of any injury to the chest wall.

And, thirdly, the fact that the pathological diagnosis indicated a pre-existing condition; and I offer that opinion for what it is worth.” (R. 91-92).

Dr. Gray further stated “Well, I felt that he would have been fit to return to work approximately October 1, 1948, although I didn’t see him for at least four weeks prior to that time. I felt that the period of disability was reasonable, and I would expect, barring any other complications, full return of the function in that time.” (R. 92).

Dr. Gray stated several times that the operation was performed only to cure the condition of the esophagus,

but added thereto was his presumptive diagnosis of carcinoma. (R. 103).

He also frankly admitted that he did not claim to be a specialist in the diseases of the esophagus, but was a specialist in traumatic surgery. (R. 106).

However, throughout his testimony he positively contended that the *condition of Lathourakis' esophagus was not due to the latter's injury sustained on July 16, 1948.*

Dr. Gray thus upon oath contradicted Drs. Williams' and Slyfield's unsworn letters both as to Lathourakis suffering any permanent disability from his accidental injury and also as to his temporary total disability not having ceased by October 1, 1948.

This medical testimony of Drs. McGowan and Gray is at least impliedly corroborated, whereas the truth of Drs. Slyfield's and Williams' unsworn statements is at least impliedly challenged by Lathourakis having worked during the 1949 Bristol Bay salmon fishing season as a gill net fisherman during which he earned \$1,528.67 and when he and his fishing partner caught 8400 fish. (R. 111).

The testimony of the witness Sheils does not in anywise challenge the truth of Dr. McGowan's and Dr. Gray's testimony. The fact is conceded by all that Lathourakis did undergo a very serious operation in the fall of 1948 and Dr. McGowan himself testified that upon convalescence therefrom Lathourakis would probably have *permanent disability of from 20% to*

30% as a result of that operation, in his ability to work. (R. 80-81).

With this evidence before it the Board found that appellee Lathourakis had suffered temporary total disability to May 20, 1949 (Award, R. 16); which was affirmed by the Judgment allowing 307 days of temporary total disability compensation (R. 125), notwithstanding that Dr. Williams stated in his letter of March 23, 1949, that Lathourakis' condition had become fixed on March 22, 1949 (R. 118), and notwithstanding that Dr. Gray testified that in his opinion Lathourakis' recovery from his injury would occur on October 1, 1948. (R. 92).

On this evidence the Board found that Lathourakis had suffered 50% permanent disability (Award, R. 17) which was affirmed by the Judgment (R. 125), notwithstanding that Dr. Williams fixed it at 65% for unspecified permanent partial disability and 20% to the forearm in his letter of March 23, 1949 (R. 118), and at the same percentage except to change the 20% to 25% in his letter of May 20, 1949 (R. 37-38), and notwithstanding that Dr. Gray had stated and testified that in his opinion Lathourakis made recovery from his injury on October 1, 1948 (R. 92), and Dr. McGowan stated that appellee Lathourakis' permanent partial disability from the result of his operation would only be 20% to 30%. (R. 81).

Appellant is so confident that no challenge can be successfully sustained against the competency of its evidence adduced by Doctors McGowan and Gray that

it does not feel justified in extending this brief by citing authorities in support thereof.

Furthermore appellant already has cited many decisions in proof of its contention that all of the evidence adduced on behalf of appellee was incompetent and that the general rule is that a finding made by such a tribunal as the Alaska Industrial Board is not conclusive when it is based upon incompetent evidence; hence, appellant submits that those decisions are also authoritative support for its contention in this section of its brief that the competent evidence adduced at the hearing proved that appellee Lathourakis suffered no permanent disability from his injury.

TEMPORARY TOTAL DISABILITY AND PERMANENT, PARTIAL OR TOTAL, DISABILITY CANNOT BE SUSTAINED AS A RESULT OF ONE AND THE SAME INJURY.

Question 2. (Point 6, R. 132.)

The Act sets upon a schedule of compensation payable for total and permanent disability.

See Subsections a, b, c, d, and e, Section 1, Appendix A, Page 7, *infra*.

Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, or hearing in both ears also constitutes total and permanent disability compensable in accordance with the foregoing subsections (a), (b), (c), (d), and (e).

See Section 1 of Act, Appendix A, Pages 11-12, *infra*.

The Act recognizes that injuries may be permanent in character, yet not totally but only partially disabling; hence provides that permanent, partial disability shall be compensated only proportionately to permanent, total disability as follows:

“Whenever such employee receives an injury arising out of and in the course of employment as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars.

“To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her earning capacity twenty-five percentum, he or she would be entitled to receive One Thousand Eight Hundred Dollars, it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars that twenty-five per centum does to one hundred percentum. Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum, he or

she would be entitled to receive Five Thousand Four Hundred Dollars, it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars that seventy-five per centum does to one hundred per centum."

See Section 1 of Act, Appendix A, Page 12-13, *infra*.

The Act also specifies that the loss of certain members of the body, shall constitute partial permanent disability, namely: The loss of a thumb, an index finger, any other finger, a great toe, any other toe, a hand, an arm, a foot, a leg, an eye, an ear, and a nose; and prescribes definite compensation under varying circumstances for such respective losses. Permanent total loss of use of any such member is compensated the same as the loss of such member.

See Section 1 of Act, Appendix A, Pages 8-10, *infra*.

The Act does not define temporary disability but it cannot be less than total loss of earning capacity:

"WHEN RIGHT TO COMPENSATION ACCRUES. No compensation shall be paid hereunder for an injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury. * * *"

See Section 8 of Act, Appendix A, Page 21, *infra*.

Compensation payable for temporary disabling injuries is

“for all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, 65 per cent of his daily wages.”

Section 1 of Act, Appendix A, Pages 10-11, *infra*.

The Act specifically limits total compensation for partial permanent disability to \$7200.00; for total permanent disability to \$9,000.00.

See Section 1 of Act, Appendix A, Page 12, also 5, 7, *infra*.

The Act fails to specify the total compensation that may be paid for total temporary disability; but seemingly it must be limited by the \$7200.00 total compensation payable for partial permanent disability, or at least by the \$9000.00 payable for total permanent disability because it would be illogical to pay for a lesser disability a greater compensation than is payable for a greater disability.

Furthermore by Section 4 of the Act (Appendix A, Page 18, *infra*) the Board's award of an increased rate of compensation is “subject to the maximum or minimum provided in this schedule.” Hence, undoubtedly, in any event, compensation for temporary disability is limited to \$9,000.00, the highest amount payable under the Act.

Section 1 of the Act contains different schedules, namely: for death, for total permanent disability,

partial permanent disability, and temporary disability; in fact provisions relative to them are intermingled and interjected into the section without any continuity of subject.

The Act provides:

“And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, *relating to cases other than temporary disability*, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provisions in this schedule.” (Emphasis supplied).

See Section 1 of Act, Appendix A, Page 11, *infra*.

This provision in the 1915, 1923, 1927, and 1929 Acts reads:

“And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, *relating to cases other than temporary disability, and the employee has been paid compensation for temporary disability*, the amount so paid him shall be *deducted from* the amount to which he shall be entitled under such provision in this schedule.” (Emphasis supplied).

Sec. 1, p. 151, Ch. 71 ASL 1915;

Sec. 1, p. 241, Ch. 98, ASL 1923;

Sec. 1, 154, Ch. 77, ASL 1927;

Sec. 1, p. 52, Ch. 25, ASL 1929.

Thus, the words “in addition to”, instead of the words “deducted from,” were first used by, and the

clause “and the employee has been paid compensation for temporary disability” was first omitted from the present or 1946 Act.

See Section 1, Appendix A, Page 11, *infra*.

Had the legislature intended that “temporary disability compensation,” already paid, should not be deducted from such partial or total disability compensation as was later paid or payable to the injured employee, then it would simply have changed the words “deducted from” to “in addition to.”

But, that was not the legislature’s intent; hence, it also by the 1946 Act struck out and eliminated the words “and the employee has been paid compensation for temporary disability,” so as to clearly indicate that the words “the amount so paid him” did not mean such sum as had been paid the employee as “compensation for temporary disability”; otherwise, there was no sense in changing the clear statute, into ambiguity, because had the words “and the employee has been paid compensation for temporary disability” been retained in the statute, then the words “the amount so paid him” probably could have been held to refer back to the opening sentence in this same paragraph, i.e.: “for all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, 65 per cent of his daily wages.”

The juxtaposition of the last quoted sentence to the other language in this particular subparagraph of Section 1 of the Act, which was so amended by the

1946 Act, is without significance in view of the awkward intermingling of different subparagraphs, subsections and provisions throughout Section 1 of the Act without regard to continuity or logical sequence or antecedence of similar or dissimilar purposes thereof.

Clearly the legislature by eliminating the words "and the employee has been paid compensation for temporary disability" intended that the retained words "relating to cases other than temporary disability" should make the entire provision beyond any question of doubt inapplicable to injuries for which temporary disability compensation is payable, and to provide for the contingency of an injury eventually but unpredicted actually resulting in two distinct classes of compensatory injuries, for example: An unmarried man loses a thumb for which he is paid \$720.00 but complications set in and he loses an index finger for which he is paid \$450.00, and further complications set in causing him to lose his remaining fingers, so he is paid \$270.00 each or \$810.00 more for them. By using the words "in addition to" the employee is assured of receiving the total compensation of \$1980.00.

Thus appears the necessity of changing the words "deducted from" to "in addition to," because, otherwise, if the words "and the employee has been paid compensation for temporary disability" had been excluded, without changing "deducted from" to "in addition to" the absurd result might have been that

the employee would have been entitled to receive only the last \$810.00 for the loss of his three fingers other than thumb and index finger.

In this particular example, the employee doubtless under Section 4 of the Act (Appendix A, page 18 *infra*) would be entitled to receive \$2160.00 for the loss of a hand or total loss of use of a hand; but, if so, then from that \$2160.00 would be deducted the \$1980.00 previously paid him. He certainly wouldn't be entitled to be paid both the compensation of \$1980.00 for the individual loss of his thumb and four fingers, plus \$2160.00 for the total loss of his hand. This contention, appellant submits, is supported by this Court's decision in

Fern G. M. Co. v. Murphy, 7 F. (2d) 613, 614,
5 A.F.R. 275, 277.

The words "the amount so paid him" therefore must mean the compensation paid him at the rate at which the injury was first rated for compensation, and before that injury had so developed as to disclose that it actually consisted of two or more distinct classes of compensatory injuries such as the aforesaid example of a loss of a thumb but complications from the injury later also causing the loss of a finger.

While the insertion of the word "other" between the word "some" and the word "provision" doubtless would have clarified its intention, yet this intention of the legislature is the only meaning that is consistent and consonant with Section 4 of the Act (Appendix A, page 18, *infra*).

Any other construction of this particular amended subparagraph of Section 1 of the 1946 Act would be directly contrary to the later expressed intention of Section 4 of the Act (Appendix A, page 18, *infra*), that compensation of a lower rating, paid under any subdivision or part of the schedule, shall be deducted from such, if any, compensation as is later paid upon that injury later being ascertained to be entitled to receive a higher rated compensation.

It will be noted that the words "this schedule" are used throughout the Act to mean the entire compensatory provisions.

See Sections 1, 4 and 6 of Act, Appendix A, Pages 2, 8, 11, 18, 20, *infra*.

The first sentence of Section 4 of the present Act reads:

"If an injured employee entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under *same or* some other part of subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her." (Emphasis supplied).

This sentence in the 1915, 1923, 1927 and 1929 Acts read:

"If any injured employee entitled to compensation *hereunder shall be paid compensation* under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or

was entitled to a higher rate of compensation under some other part *or* subdivision of this schedule then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her.” (Emphasis supplied).

Section 4, Chapter 25, Laws of Alaska 1929,
page 55;

Section 4, Chapter 77, Laws of Alaska 1927,
page 156;

Section 2, Chapter 98, Laws of Alaska 1923,
page 242;

Section 2, Chapter 71, Laws of Alaska 1915,
page 152.

It appears that the 1946 Act omitted the words “hereunder shall be paid compensation,” contained in the 1915, 1923, 1927, and 1929 Acts, and changed the word “or” to “of”, and added the words “same or” which were not included in those former Acts. The omission of the words “hereunder shall be paid compensation” makes this sentence unintelligible; in fact, the compiler of Alaska Compiled Laws 1949 took the liberty of trying to cure this ambiguity by inserting the word “is” before the word “entitled”. See Section 43-3-4, ACLA 1949, Volume 2, page 1231.

Appellant submits that in construing this sentence the omitted words “hereunder shall be paid compensation” must be read into it and that the Court has the power to supply them.

“Words or phrases may, however, be supplied by the courts and inserted in a statute, where

that is necessary to obviate repugnancy and incompetency in the statute, complete the sense thereof, and give effect to the intention of the legislature manifested therein.”

50 *Am. Jur.* 222, 234.

This Court in construing the 1923 Act said:

“To say in a case of this kind that partial destruction of a hand is worse than the amputation of the member at the wrist is as inconsistent with the provisions of the law as it is to say that it is mathematically true that a part is greater than the whole.”

Ketchikan Lumber & Shingle Co. v. Walker,
15 F. 772, 773, 5 AFR 321, 325.

Appellant submits that this principle applies to this case and that Lathourakis’ temporary total disability could not possibly be greater than his permanent partial disability, because the latter is everlasting, whereas the former is sooner or later ending. Temporariness cannot be as much as permanency.

Furthermore, such, if any, compensation as might be paid or become due Lathourakis under that portion of Section 1 of the Act hereinbefore quoted (see page 51, *supra*), is subject to the specific limitation of the broad and inclusive language “under same or some other part of subdivision of this schedule,” in Section 4 of the Act (quoted page 56, *supra*).

Furthermore, the payment of the “higher rated compensation,” so contained in the quoted first sentence of Section 4, no matter for what classification

of disability, is specifically subjected to the latter restriction in the same sentence "after first deducting the amount that has already been paid" to the employee no matter for what previously lower rated classification of disability.

No exemption from that deduction is made of compensation previously paid for temporary disability, or for any other classification of disability.

The employee "shall receive such higher rate" of compensation; but he must credit thereon or deduct therefrom "the amount that has already been paid him or her."

Only one compensation is to be paid, but that must be at the highest rate to which the injury is entitled under the classification of disability in which it falls.

Under the Act should an unmarried man lose a hand, he suffers partial, permanent disability for which he is entitled to compensation of \$2160.00. Should complications resulting from that same injury cause him to lose the arm of which that hand was a member, he then suffers total, permanent disability for which he is entitled to compensation of \$6000.00. But, he is not entitled to retain the \$2160.00 and be paid a further \$6000.00. He is entitled to a total compensation of \$6000.00; hence, the \$2160.00 already paid him must be credited upon or deducted from the \$6000.00 before the latter sum is paid him.

On the contrary, should an injury to an arm cause temporary disability for say one year, for which the

employee is paid compensation, computed at 65% of his daily wages, of \$3900.00, he would not be obliged to refund any part of that \$3900.00 if at the end of the year complications cause the loss of the arm by amputation resulting in the employee suffering partial permanent disability, for which he is entitled to compensation of \$2700.00, because the latter sum is smaller than the former.

But, he is not entitled to be paid both the \$3900.00 and the \$2700.00, because before being paid a higher rate of compensation Section 4 of the Act requires him to deduct "the amount that has already been paid him" (page 56, *supra*). Nor is he obliged to return any part of the \$3900.00 because Section 4 also states, "no such review shall affect such award, order or settlement, as regards any monies already paid."

He undoubtedly therefore would retain the \$3900.00 and would not ask for payment of the \$2700.00 inasmuch as the law does not require him to do so and humanly he would accept the larger amount.

The present Act's elimination from the quoted subparagraph of Section 1 (page 52, *supra*) of the words "and the employee has been paid compensation for temporary disability" gives an entirely different meaning than what was or could have been ascribed to the hereinbefore quoted somewhat analogous subparagraph of Section 1 of the 1915, 1923, 1927, and 1929 Acts (page 52, *supra*).

These particular words, after having been in that sentence for some 31 years, were omitted by the 1946

legislature. Presumably that must have been omitted for some purpose. While the present Act (Appendix A, pages 1 and 52, *infra*), purportedly repeals the former acts, yet we submit that to it is applicable the rule in the event of omission of words from an amendatory statute, namely:

“The omission of a word in the amendment of a statute, will be assumed to have been intentional. Where the meaning of the prior law is intended to be continued, its terminology is also usually continued, so that an omission of words implies an intended change in the meaning of the statute. Under these rules, the courts may not aid a restriction found in a prior statute, but omitted from a later one. Where it is apparent that substantive portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential, because that would in effect be the enactment of substantive law.”

50 *Am. Jur.*, 263, 276.

With those words in the statute to modify or explain not only the next preceding clause, “relating to cases other than temporary disability,” but also the immediately following clause, “The amount so paid him . . .”, both of which clauses are retained in the 1946 Act, the statute could well mean, *i.e.*: Should an injury, first supposed to be sufficiently serious to cause only temporary disability, later develop into either partial or total permanent disability, then the injured employee would be entitled to be paid the rate of

compensation under the schedule for such partial or total permanent disability; but, if he had already been paid temporary disability compensation (when it was still supposed his injury caused only temporary disability), then, the amount of such temporary disability compensation would be deducted from, under the 1915, 1923, 1927, and 1929 Acts, and under the 1946 Act would be retained by the employee or “added to,” the compensation paid him for such partial or total disability.

Very apparently such was the procedure followed under the 1915 Act and at least impliedly approved by this Court in

Fern G. M. Co. v. Murphy, 7 F. (2d) 613, 614,
5 AFR 275.

But the 1946 legislature plainly didn’t intend that such meaning should be ascribed to the statute, and therefore omitted the words, “and the employee has been paid compensation for temporary disability,” but retained the words, “relating to cases other than temporary disability,” so as to clearly state that this particular provision had nothing whatever to do with temporary disabling injuries, but only to either partial or total permanent disability.

While workmen’s compensation acts are to be liberally construed, the plain, clear, statutory intent is not to be ignored.

The Alaskan act creates three classifications of disabilities, i.e.: temporary, partial permanent, and

total permanent for which different rates of compensation are payable but it does not authorize payment of more than one compensation for the disability, in whichever classification it falls, caused by one injury. Nor can the Alaska Act result in the absurdity, criticized by the U. S. Supreme Court, which apparently might be possible under the Harbor Worker's and Longshoreman's Act unless construed in the manner that Court did in

Baltimore & Philadelphia Steamboat Co. v. North, 284 U.S. 408.

The denial to Lathourakis of two disability compensations for one injury does not in any wise prevent him from claiming and receiving compensation for the highest rated compensation to which his injury entitled him.

Section 8 of the Act provides:

“No compensation shall be paid hereunder for an injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury.”

Appendix A, page 21, *infra*.

Thereby plainly stating that disability compensation is dependent upon loss of full earning capacity.

Similarly did the New York Statute.

Judge Pound in construing that statute said in substance that concurrent and consecutive compensation

awards violated the plain meaning of the New York Act that the injured employee should be compensated for his disability.

Markhoffer v. Markhoffer, 111 NE 379, 380;

Bethlehem Shipbuilding Corporation v. Monahan, 54 F(2d) 349, 350.

The Markhoffer decision was distinguished by the United States Supreme Court in the *Baltimore and Philadelphia Steamboat Co. v. North* case from the facts before it, but we submit even so did not hold that an injured employee could be awarded both total temporary disability and partial permanent disability compensation for one and the same injury under a statute similar to the Alaska Act.

The Alaskan Act, as seen, specifically directs the payment of the highest rated liability compensation, and does not oblige, should such a situation occur, the employee to accept a lesser sum than that which he has already been paid.

Furthermore if the quoted sub-paragraph of Section 1 is otherwise construed than as herein contended it is inconsistent with the provisions of Section 4 of the Act by which the former is necessarily controlled.

“In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails.”

59 CJ 999.

“There are cases in which an enumeration of particular things in a statute is held to be lim-

ited by general terms following the particular enumerations.”

50 *Am. Jur.* pp. 248, 251.

The Act itself does not define the words “compensation rate,” “higher rate of compensation,” or “decreased rate of compensation.”

Seemingly those expressions may be used in either or possibly both of two ways, viz.:

“Compensation rate” means: (A) either the actual money paid to the employee, or, (B) the classification of the injury itself.

“Higher rate of compensation” means: (A) either, more money is payable to the injured employee than first awarded, or, (B) the injury develops into more seriousness than at first found.

“Decreased rate of compensation” means: either (A) less money is payable to the injured employee than first awarded, or (B) the injury is found to be of less seriousness than at first found.

The Board’s first finding (R. 16) that Lathourakis suffered total temporary disability until May 20, 1949, affirmed by judgment in allowing 307 days total temporary disability (R. 125), is actually obliterated by its subsequent finding, although in the same award, that he is 50% permanently disabled under the well known rule that, if two statements are inconsistent with each other, the last in point of time controls.

The judgment awarded appellee Lathourakis temporary total compensation of \$2005.00 which is in

addition to the \$1050.80 already paid him by appellant (R. 125) and also 50% permanent disability compensation of \$3600.00.

In money terms certainly \$3600.00 is a higher rate of compensation than the sum of \$2005.00 plus \$1050.80.

Furthermore, logic bespeaks that a 50% permanent disability is a more serious injury than temporary disability no matter how long prolonged, because the temporary disability necessarily eventually will cease; therefore, that a 50% permanent disability rating is a higher rate of compensation than is temporary disability.

Seemingly, the larger amount and the higher rated disability compensation controls the lesser, not only because larger in size but because last in expression both in award and judgment.

Clearly under Section 4 of the statute, if on Monday the Board at a hearing had given appellee Lathourakis a compensation rating of temporary total disability for 307 days with compensation of \$3055.80 but at another hearing a week later had made a finding that Lathourakis had suffered 50% permanent disability with compensation of \$3600.00, before appellee Lathourakis could compel payment of the \$3600.00 he would have to give credit for the \$3055.80 because Section 4 states in effect that before he would be paid the higher rate he must first deduct the amount that has already been paid him. (Appendix A, page 17, *infra*.)

Surely the plain purpose of the Act cannot be discarded simply because at a single hearing the Board first found that Lathourakis was entitled to temporary total disability and then found that he was also entitled to 50% permanent disability compensation.

Moreover, Section 4 of the Act specifically provides that on such review before the Board the latter “may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered or agreed to, *subject to the maximum or minimum provided in this Act.*” (Emphasis supplied.)

Appendix A, Page 18, *infra*.

While it is true that this court has held that an injury to a leg may result in total and permanent disability and therefore entitled under the 1915 Act to higher compensation rating than the loss of the leg itself

Fern G. M. Co. v. Murphy, 7 F(2d) 613, 614,
5 AFR 275, 277

it did not hold that the employee could recover both the compensation for the loss of the leg and the compensation for total and permanent disability.

Both the District Court and the Board held that Lathourakis sustained, out of the same and one only injury, both temporary total disability for more than 300 days and also 50% permanent disability, and that he was entitled to be paid compensation for each even though their total exceeds the maximum compensation allowed by the law for either rated compensation.

Appellant submits that, assuming but not admitting that it had been proved by competent evidence, appel-

lee Lathourakis can have either \$3055.80 (\$2005.00 allowed by court [R. 125] plus the \$1050.80 already paid him, totalling \$3055.80), or else he can take the \$3600.00; but he can't have both because then he is being paid two compensations for one injury in a total in excess of the maximum allowed by the Act at whichever of those two disability compensation ratings is correct.

ATTORNEY FEE NOT TAXABLE AS COSTS AGAINST UNSUCCESSFUL LITIGANT ON APPEAL TO DISTRICT COURT FOR REVIEW OF ALASKA INDUSTRIAL BOARD'S AWARD.

Question 3 (Point 7, R. 132).

The District Court in its judgment allowed as costs an attorney fee of \$350.00 to appellee Lathourakis (R. 125) for the services of his attorney in the proceedings before the District Court.

The error of this allowance is the subject of Appellant's "Statement of Points" 7. (R. 132).

This \$350.00 attorney fee should not be confused with the \$1100.00 attorney fee allowed by the Board in its award (R. 18), the invalidity whereof appellant challenged in subparagraph 4 of Paragraph IX of its "Complaint and Appeal" (R. 7), which contention appellee Lathourakis conceded by his not denying that subparagraph in his Answer. (R. 19).

Alaska has no statute under which an attorney fee can be allowed as an item of costs to the successful litigant, unless under the general statute providing:

"Disbursements allowed to party entitled to costs. Party's right to witness' and attorney's

fees. A party entitled to costs shall also be allowed for all necessary disbursements, * * * * *; * * * * * and a reasonable attorney's fee to be fixed by the Court."

Sec. 55-11-55, ACLA 1949.

The words "and a reasonable attorney's fee to be fixed by the Court" were included in the statute by amendment in 1947.

Ch. 84, ASL 1947.

The same words were in Section 1, Ch. 38, ASL 1923, which were construed in this Court's decisions.

Pond v. Goldstein, 41 F. (2d) 76, 5 AFR 544, 556;

Forno v. Coyle, 75 F. (2d) 692, 5 AFR 758, 766.

Appellant does not contend that Sec. 55-11-55, ACLA 1949, is invalid. It contends that that Statute is not applicable to this proceeding which was an appeal for review by the District Court of a decision and award by the Alaska Industrial Board in favor of an injured employee under the Alaska Workmen's Compensation Act. (Full text, Appendix A).

This Court said, in discussing allowance of attorney's fee in a case where Ch. 58, ASL 1937, had amended Ch. 38, ASL 1923, by removing the words "and a reasonable attorney's fee to be fixed by the Court" two days before entry of judgment, viz.:

"The assignment is well taken. The right to costs is purely statutory. No such right existed at common law. *Day v. Woodworth*, 13 How. 363,

372, 14 L.ed. 181. No party is entitled to costs until he prevails in the suit, in other words, until judgment is entered. Whatever the statute provides at that time is the measure of his allowable costs. As was said in *Begbie v. Begbie*, 128 Cal. 154, 155, 60 P. 667, 49 LRA 141:

‘The right to recover costs exists by virtue of statutory provision. * * * * * and their recovery is governed by the statute in force at the time the right to have them taxed accrued.’ ”

Mutual, etc., Ass’n. v. Moyer, 94 F. (2d) 906,
9 Alaska Reports 235, 240, cer. den. 304 US
581.

Section 10 of the Workmen’s Compensation Act of Alaska provides:

“Right to compensation exclusive. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and *no rights or remedies, except those provided for by this Act, shall accrue to employees* entitled to compensation under this Act while it is in effect. * * * * *” (Emphasis supplied).

Appendix A, Page 22, *infra*.

Section 17 of the Act further says:

“* * * * * In all proceedings before the Industrial Board or in any Court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.”

Appendix A, Page 32, *infra*.

Appellant contends that this provision is solely procedural, providing only for the manner of awarding and taxing costs, and not a statutory authorization that attorney's fees may be taxed as costs.

Appellant contends that such conclusion is logically premised upon the subsequent language in Section 23 of the Act, and that such later language is a specific limitation upon and restriction of the quoted language from Section 17, if it can be construed as a grant of authority, namely:

“The fees of attorneys and physicians, and the charges of nurses and hospitals, for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fees. The fee so fixed shall be binding upon both the claimant and his or her attorney, and *the employer shall pay to the attorney out of the award* the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. * * * * *”
(Emphasis supplied).

Appendix A, Page 39, *infra*.

This language, appellant submits, distinctly shows that the legislature intended that the injured employee should not receive additional compensation by way of attorney's fees in any proceedings under the Act either before the Board or the District Court.

In this instance, it happens that the unsuccessful litigant is appellant who was the employer. But sauce for the goose should be sauce for the gander. It is entirely possible that an injured employee might be, in fact in instances he has been, the unsuccessful litigant on such an appeal. It scarcely seems possible that the Workmen's Compensation Act intended, should an injured employee appeal to the District Court from what he thought was an erroneous decision of the Board, that he might be charged with the fee of the employer's lawyer in that review or appeal proceedings should the District Court sustain the Board's decision.

Appellant concedes the dearth of authority on this question, which has not to its knowledge previously been presented to this Court, but it maintains that the provisions of Section 55-11-55, ACLA 1949, *supra*, are inapplicable in this proceeding in the absence of specific authority for the application thereof by the Workmen's Compensation Act and in view of the latter's specific restriction of attorney fees to be paid out of the awarded compensation under Section 23 of the Act (page 71, *supra*); hence, that the District Court was without jurisdiction in its judgment (R. 125) to adjudge that appellant should pay appellee Lathourakis an attorney fee of \$350.00.

Appellant submits that the lower Court's previous decision in

United Benefit Life Ins. Co. v. Elliott, et al.,
11 Alaska Reports 466, 476,

wherein it held that the plaintiff in an interpleader suit was not entitled to attorney fees as an allowable cost under then Section 4065, CLA 1933, which is now Section 55-11-55, ACLA 1949, *supra*, with the added amendments, spoken of in that decision, of Chapters 58, ASL 1937, and 84, ASL 1947, clearly shows that it could not allow the \$350.00, or any sum, for attorney fees as allowable costs in this suit because this proceedings is not within the purview of the classes of cases mentioned in Section 55-11-52, ACLA 1949, formerly Section 4062, CLA 1933.

“Chapter 2, Title 56”, mentioned in 2nd subparagraph of Section 55-11-52, ACLA 1949, is “Actions by and against Public Corporations”, Sections 56-2-1 to 56-2-4, ACLA 1949, Code of Civil Procedure, Volume 3, ACLA 1949, formerly Chapter CII, Sections 3816 to 3819, ACL 1933.

“Chapter 4, Title 56”, mentioned in 2nd subparagraph of Section 55-11-52, ACLA 1949, is “Actions to Avoid Charters and to Prevent the Usurpation of an office or franchise and to determine the right thereto,” Sections 56-4-1 to 56-4-14, ACLA 1949, Code of Civil Procedure, Volume 3, ACLA 1949, formerly Chapter CIII, Sections 3824 to 3837, ACL 1933.

CONCLUSION.

For the foregoing reasons appellant urges that the judgment of the District Court and the decision and award of the Alaska Industrial Board should be reversed and modified to holding that appellee Lathourakis' total temporary disability ended on October 1, 1948, for which he was entitled to be paid total temporary disability compensation of \$1050.80 only, which was paid him prior to his making and filing his claim herein (R. 10), and that he sustained no permanent either partial or total disability whatsoever and is not entitled to be paid any permanent either partial or total disability compensation; and, that the judgment of the District Court should be reversed in the allowing appellee Lathourakis an attorney fee of \$350.00, or any sum, as an allowable cost for the services of his attorney in the proceedings on appeal before the District Court.

Dated, September 6, 1950.

Respectfully submitted,

R. E. ROBERTSON,

ROBERT W. HOLLAND,

BOGLE, BOGLE & GATES,

Attorneys for Appellant.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

Compilation of Workmen's Compensation Act of Alaska, Chapter 9, SLA 1946, entitled

“AN ACT. Relating to the measure and recovery of compensation of injured employees in all businesses, occupations, work, employments and industries in the Territory of Alaska, except domestic service, agriculture, dairying and the operation of railroads as common carriers, and relating to the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such businesses and industries; providing for a second injury fund; creating an Industrial Board, and defining its duties; making the Territorial Department of Labor the administrative agency to carry into effect the provision of this Act; providing for penalties, and repealing Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska, 1933, as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937.”

as amended by Chapter 45, SLA 1947, entitled

“AN ACT. Amending the Workmen's Compensation Act, Chapter 9, Session Laws of Alaska, 1946, to relieve minor surviving children in remote and isolated sections of the Territory from the consequences of failure to file a claim within the time prescribed by Section 29 of the Act.”,

now compiled as Sections 43-3-1 to 43-3-39, ACLA 1949.

§43-3-1. Employment covered: Compensation allowed: Death benefits: Total and permanent disability: Partial permanent disability: Disfigurement: Temporary disability: Loss of members: Amputations: Other permanent partial injuries: Payments to second injury fund: Fund beneficiaries: Refund of payments to fund: Injury causing permanent disability when combined with previous disability. Any person, or persons, partnership, joint stock company, association or corporation, employing three or more employees in connection with any business, occupation, work, employment or industry, carried on in this Territory, including any department, agency or instrumentality of the Territorial Government, Municipality or Public Utility District, except domestic service, agriculture, dairying, or the operation of railroads as common carriers, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment or to the beneficiaries named herein, as the same are hereinafter designated and defined in all cases where the employee shall be so injured and such injuries shall result in his or her death.

(COMPENSATION ALLOWED.) The compensation to which such employee so injured, or, in case of his or her death, if death results from such injury,

such beneficiaries shall be entitled, and for which such employer shall be legally liable, shall be as follows:

(1) (AMOUNT OF DEATH BENEFITS.) In the event of the death of any such employee resulting from such injury, where such employee at the time of his death was married, his widow shall be entitled to receive the sum of Four Thousand Five Hundred Dollars (\$4,500.00).

(2) (CHILDREN). In those cases where such married employees had a child or children under the age of eighteen (18) years at the time of his death, his widow shall be entitled to receive in addition to the sum above specified, the sum of Nine Hundred Dollars (\$900.00) for each child under the age of eighteen (18) years, or child wholly dependent upon his or her parents for support by reason of mental or physical incompetency, or unborn or posthumous child, which such employee left at the time of his decease, but not to exceed in all the sum of Nine Thousand Dollars (\$9,000.00).

(3) (DEPENDENT PARENTS.) In those cases where such employee left either father or mother or both, dependent upon him for support at the time of his death, the sum of Nine Hundred Dollars (\$900.00) each shall be paid to such father or mother or both, in addition to the sum provided for and made payable to the widow. In no case, however, is the total sum to be paid hereunder to exceed the sum of Nine Thousand Dollars (\$9,000.00) and the payments to which the widow and children may be entitled shall be first

paid out of said sum of Nine Thousand Dollars (\$9,000.00).

(4) (NON-DEPENDENT PARENTS.) In those cases where such deceased employee was unmarried at the time of his or her death survived by either his or her father or mother, such father or mother shall be paid the sum of One Thousand Eight Hundred Dollars (\$1,800.00); and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars (\$195.00) and such other expenses, if any, arising after the injury and before the death not to exceed One Hundred Ninety-five Dollars (\$195.00).

(5) (NON-DEPENDENT PARENTS.) Where such deceased employee was unmarried and was survived by his or her father and mother, such father and mother shall be paid the sum of One Thousand Eight Hundred Dollars (\$1,800.00) each; and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars (\$195.00) and such other expenses, if any, arising after the injury and before his death not to exceed One Hundred Ninety-five Dollars (\$195.00).

(6) (WIDOWER WITH DEPENDENT MINORS: GUARDIAN.) In those cases where such deceased employee was a widower at the time of his death, but left one or more minor orphan children or child wholly dependent upon the deceased for support

by reason of mental or physical incompetency, there shall be paid the sum of Four Thousand Five Hundred Dollars (\$4,500.00), and the further sum of Nine Hundred Dollars (\$900.00) for each orphan child under the age of eighteen (18) years provided the total amount paid shall not exceed Nine Thousand Dollars (\$9,000.00), and the judge of the Probate Court of the precinct wherein such accident or injury occurred, shall appoint a guardian for all of said children, who shall be entitled to, and who shall be paid, the amount specified in this paragraph, for the benefit of said orphan children, and shall divide Four Thousand Five Hundred Dollars (\$4,500.00) thereof equally among such children and divide the surplus, if any, among the children under eighteen (18) years of age.

(7) (AMOUNTS PAID NON-RESIDENT NON-CITIZEN BENEFICIARIES.) Provided, however, that if such beneficiary or beneficiaries as described in subdivisions 1 to 6, inclusive, immediately preceding this subsection be neither resident or a citizen of the United States of America, then the amount due and payable to such beneficiary or beneficiaries shall be in amounts as follows:

(a) As to all beneficiaries, except a wife or minor children, fifty per centum (50%) of the sum set forth in subdivisions 1 to 6, immediately preceding, and fifty per centum (50%) shall be paid to the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(b) As to a wife or minor children, sixty per centum (60%) of the sums set forth in subdivisions 1 to 6 immediately preceding, and forty per centum (40%) of the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(8) (FUNERAL EXPENSES: PAYMENT TO SECOND INJURY FUND). In those cases where such deceased employee was, at the time of his or her death unmarried, and leaves no children nor father nor mother, the employer shall be required to pay the funeral expenses of the deceased not to exceed the sum of One Hundred Ninety-five Dollars (\$195.00), and such other expenses, if any, arising after the injury and before the death, not to exceed the further sum of One Hundred Ninety-five Dollars (\$195.00), and in addition thereto shall pay to the second injury fund the sum of One Thousand Five Hundred Dollars (\$1,500.00), for the sole benefit of those entitled to participate therein as hereinafter provided.

(SECOND INJURY FUND.) There is hereby created a Second Injury Fund, to be administered by the Commissioner of Labor in accordance with the orders and awards of the Alaska Industrial Board.

(TOTAL AND PERMANENT DISABILITY.) Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally or permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) (MARRIED PERSON.) If such employee was at the time of his injury married he shall be entitled to receive Seven Thousand Two Hundred Dollars (\$7,200.00) with Nine Hundred Dollars (\$900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars (\$9,000.00).

(b) (FATHER AND MOTHER.) If such employee at the time of his injury had no wife or children, but has a mother or father, Six Thousand Three Hundred Dollars (\$6,300.00).

(c) (FATHER AND MOTHER.) In cases, where such employee who at the time of his injury had both father and mother, Six Thousand Five Hundred Dollars (\$6,500.00).

(d) (MINOR CHILDREN). In those cases, where such employee was at the time of his injury, a widower, or was divorced, but had minor children, he shall receive the sum of Six Thousand Dollars (\$6,000.00), with an additional sum of Nine Hundred Dollars (\$900.00) for each child below the age of eighteen (18) years, provided that the total sum to be paid such employee shall not in any case exceed the sum of Nine Thousand Dollars (\$9,000.00).

(e) (NO DEPENDENTS.) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother, he shall receive the sum of Six Thousand Dollars (\$6,000.00).

(PARTIAL PERMANENT DISABILITY.)

Where any such employee receives an injury arising out of, and in the course of his or her employment, resulting in his or her partial permanent disability, he or she shall be paid in accordance with the following schedule:

For the loss of a Thumb:

1 (a) In case the employee was at the time of the injury unmarried, \$720.00.

1 (b) In case the employee was married but had no children, \$900.00.

1 (c) In case the employee was either married or a widower, but had one or more children, \$1,080.00.

For the loss of an Index Finger:

2 (a) In case the employee was at the time of the injury unmarried, \$450.00.

2 (b) In case the employee was married but had no children, \$585.00.

2 (c) In case the employee was either married or a widower, but had one or more children, \$720.00.

For the loss of any other finger than the Index Finger and Thumb, \$270.00.

For the loss of a Great Toe, \$450.00.

For the loss of any other Toe other than the Great Toe, \$180.00.

For the loss of a Hand:

3 (3) In case the employee was at the time of the injury unmarried, \$2,160.00.

3 (b) In case the employee was married but had no children, \$2,880.00.

3 (c) In case the employer was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Arm:

4 (a) In case the employee was at the time of the injury unmarried, \$2,700.00.

4 (b) In case the employee was married but had no children, \$3,600.00.

4 (c) In case the employee was either married, or a widower and had one child, \$3,600.00 and \$450.00 additional for each such additional child, the total amount not to exceed, however, \$4,500.00.

For the loss of a Foot:

5 (a) In case the employee was at the time of the injury unmarried, \$2,160.00.

5 (b) In case the employee was married but had no children, \$2,700.00.

5 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 and \$360.00 additional for each additional child, but not to exceed the total sum of \$3,600.00.

For the loss of a Leg:

6 (a) In case the employee was at the time of the injury unmarried, \$2,700.00.

6 (b) In case the employee was married but had no children, \$3,600.00.

6 (c) In case the employee was either married, or a widower and had but one child, \$3,600.00 with \$450.00 for each such additional child, not to exceed the total sum of \$4,500.00.

For the loss of an Eye:

7 (a) In case the employee was at the time of the injury unmarried, \$2,160.00.

7 (b) In case the employee was married but had no children, \$2,880.00.

7 (c) In case the employee was either married, or a widower and had one child, \$2,880.00 plus \$360.00 for each additional child, not to exceed, however, the total sum of \$3,600.00.

For the loss of an Ear: \$360.00.

For the loss of hearing in one Ear: \$720.00.

For the loss of the Nose: \$720.00.

Compensation for permanent total loss of use of a member shall be the same as for the loss of such member.

(DISFIGUREMENT.) The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding, however, the sum of Two Thousand Dollars (\$2,000.00).

(TEMPORARY DISABILITY.) For all injuries causing temporary disability, the employer shall pay

the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

(LOSS OF MEMBERS AS TOTAL PERMANENT DISABILITY.) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or

any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

(AMPUTATIONS.) Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and ankle shall be considered equivalent to the loss of a leg.

(OTHER PERMANENT PARTIAL INJURIES.) Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars (\$7,200.00).

To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars (\$7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her

earning capacity twenty-five per centum (25%), he or she would be entitled to receive One Thousand Eight Hundred Dollars (\$1,800.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars (\$7,200.00) that twenty-five per centum (25%) does to one hundred per centum (100%). Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum (75%), he or she would be entitled to receive Five Thousand Four Hundred Dollars (\$5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars (\$7,200.00) that seventy-five per centum (75%) does to one hundred per centum (100%).

(9) (PAYMENTS TO SECOND INJURY FUND.) Whenever an employee shall suffer a compensable injury which results in permanent partial disability by reason of the total or partial loss or loss of use of a member or members, as provided in Paragraph (8) hereof, and which injury entitled him or her to compensate pursuant to such Paragraph (8), the employer, or his insurance carrier, shall, in addition to the compensation provided for in said Paragraph (8), pay into the second injury fund a lump sum, without interest deductions, equal to two per centum (2%) of the total compensation to which the employee is entitled under said Paragraph (8) of this section for the said permanent partial disability, the said sum to be paid into such second injury fund as soon as the total amount of the permanent partial dis-

ability payable for the particular injury is determined by the Industrial Board.

(10) (SECOND INJURY FUND BENEFICIARIES.) The sums required to be paid into the second injury fund under the provisions of Paragraph (7), (8) and (9) of this section shall be paid into said second injury fund of the Commissioner of Labor for the sole benefit of those entitled to participate therein under the provisions of Paragraph (12) of this section, the same to be paid out by said Commissioner of Labor in accordance with the orders and awards of the Industrial Board.

(11) (REFUND OF PAYMENTS TO SECOND INJURY FUND.) In case a deposit or payment has been made into such second injury fund, as provided in Paragraph (7) of this section, and it is later shown that there are other beneficiaries or that the beneficiaries designated are entitled to further or greater benefits, or, as provided in Paragraph (8) of this Section, and it is later shown that there are beneficiaries entitled to compensation, or, if deposits or payment has been made pursuant to Paragraph (9) hereof by mistake or inadvertence or under such circumstances that justice requires a refund thereof, the Industrial Board is hereby authorized to refund such deposit or payment.

(12) (INJURY CAUSING TOTAL PERMANENT DISABILITY WHEN COMBINED WITH PREVIOUS DISABILITY.) In those cases where an employee receives an injury arising out of and in

the course of his or her employment which, of itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury found hereinbefore created and provided.

§ 43-3-2. Treatment and care of injured employees: Duty and liability of employer: Duration: Prevailing fees: Selection of physicians, surgeons and hospitals: Aggravation of injuries by incompetence or neglect of physician: Liability: Right of employee to provide physician. The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus for such period as the nature of the injury or the process of recovery may require, not exceeding one year from and after the date of injury to any such employee. The employer shall be liable for the payment of the expenses of medical, surgical or other attendance or treatment, nurse, and hospital service, medicine, crutches, and apparatus necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, not exceeding one

year from and after the date of injury to any such employee. All fees and other charges for such treatment and services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living. The employer shall have the exclusive right, and it shall be his duty to select and furnish the necessary physicians, surgeons and hospitals and to that end he may enter into all necessary contracts with such physicians, surgeons and hospitals for the furnishing of such services and treatments. Provided, that if it be made to appear in any suit, action or proceeding brought against the employer that the injuries sustained by the employee were aggravated on account of the incompetence or neglect of the physician or surgeon selected by the employer, it shall be prima facie evidence that the employer failed to use due care in the selection of such physician or surgeon and in such case the employer and physician or surgeon shall be jointly and separately liable for all damages resulting from such incompetence or neglect. Nothing contained in this section shall be construed to limit the right of the employee, to provide in any case, at his own expense, a consulting physician or any attending physician whom he may desire.

§ 43-3-3. Time and manner of paying compensation: Interest: Failure to pay compensation: Penalty. All compensation allowed hereunder for temporary disability shall be paid periodically and promptly in like manner as wages, and as it accrues, and directly to the person entitled thereto, without waiting for an

award by the Industrial Board, and shall bear interest from and after the period of thirty days after the date of the injury by which the claim for compensation arose at the rate of eight per centum (8%) per annum until paid. If the employer or insurance carrier shall fail to pay any installment of compensation within twenty days after the same becomes due, there shall be paid by the employer, or his insurance carrier, an additional sum equal to ten per centum (10%) of the compensation then due, unless such delay or default is excused by the Industrial Board, on the application of the employer or insurance carrier and upon the ground that owing to conditions over which the employer or insurance carrier had no control, such payment could not be made.

In all other cases, compensation shall be paid bi-weekly, monthly, or otherwise, as the Industrial Board may determine to be for the best interest of the injured employee or his or her beneficiaries; and such payments shall bear interest from and after the period of thirty days after the date of the order or award. If the employer or insurance carrier shall fail to pay compensation according to the terms of such order or award within twenty days thereafter, except in the case of an appeal, there shall be paid by the employer, or his insurance carrier, an additional sum equal to twenty per centum (20%) of the compensation due.

§ 43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitation of time. If an injured employee (is)

entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from a date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury.

§ 43-3-5. Lien to secure compensation: Extent: Priority and rank: Notice of lien: Filing and contents: Enforcement: Attachment. Every employee and every beneficiary entitled to compensation under the provisions of this Act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fees therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in and to the property affected by

such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or some one on his or her behalf, and stating substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided.

§43-3-6. Compromise: Filing memorandum: Approval by Board: Effect: When agreement to be approved. At any time after death, or after seven days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, shall have the right to reach an agreement in regard to any claim for injury or death hereunder in accordance with the schedule hereof, but

a memorandum of the agreement, in a form prescribed by the Industrial Board shall be filed with the Board, otherwise the same shall be void for any purpose. If approved by the Board, such agreement shall be enforceable the same as any order or award of the Board, and subject only to modification in accordance with the provisions of Section 4 hereof (§ 43-3-4 herein). Such agreement shall be approved by the Board only when the terms conform to the provisions of this Act, and, if it involves or is likely to involve permanent disability, only after an impartial examination and an opportunity to be heard.

§43-3-7. Injuries not covered. No compensation shall be allowed or paid for the injury or death of an employee in any case where such injury or death was occasioned by his or her wilful intention to bring about the injury or death of himself or herself or of another, or where the employee's intoxication was the proximate cause of injury.

§ 43-3-8. When right to compensation accrues: Period of incapacity: Report to employer: Compensation not to be paid prior to report. No compensation shall be paid hereunder for any injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury. It shall be the duty of every person claiming compensation under the provisions of this Act for any injury sustained by him to make or cause to be made, a report thereof to his em-

ployer as soon as practicable after sustaining the same, and no compensation shall be paid prior to the day on which such report is made.

§43-3-9. Presumption of employment: "Independent contractors" defined. Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this Act. The term "independent contractor" shall be taken to mean, for the purpose of this Act, any person who renders service, other than manual labor, for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

§43-3-10. Right to compensation exclusive: Failure to secure insurance: Election of remedies: Pleading or proof of contributory negligence unnecessary: Defenses barred. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the person or legal representative, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for

self-insurance, then any injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee.

§ 43-3-11. Step-parents, adopted children, and step-children: How regarded. Step-parents shall be regarded in this Act as parents, and an adopted child, or adopted children, or a step-child or children, shall be regarded in this Act as issue of the body.

§ 43-2-12. Statement of beneficiaries by employee: Change in beneficiaries or address: Notice to beneficiaries: Form: Failure to list or notify beneficiaries: Employee's statement as evidence: Service of notice of claim.

(a) (STATEMENT OF BENEFICIARIES BY EMPLOYEE.) Every employer coming within the provisions of this Act shall require of every employee who shall execute the same, either at the time he or she is employed or thereafter, a written statement showing the name or names of each and all persons that would be entitled to benefits under the provisions of this Act in case such employee should become deceased

as a result of any injury received by him, or her, arising out of and in the course of his or her employment, such written statement shall bear the date upon which the same shall be furnished to the employer, and shall be signed by the employee. Provided, that, in cases where such employee is unable to write his or her name, his or her name may be affixed to such statement by another, and such employee shall make his or her mark in the manner customary in such cases and such mark shall be made in the presence of at least one witness, who shall subscribe such statement as a witness. In all cases the employee shall be furnished a duplicate of the said statement.

(b) (CHANGE IN BENEFICIARIES OR ADDRESS THEREOF.) In all cases where there shall be a change of beneficiaries, or a change in the address of any beneficiary, the employee may furnish the employer with a new statement showing such change, such new statement to be so furnished shall in all respects conform and comply with the provisions hereof with reference to the original statement to be furnished.

(c) (NOTICE TO BENEFICIARIES.) In all cases where such statement, or statements, is, or are, furnished the employer by the employee, the employer shall, if such employee becomes deceased as a result of an injury received in the course of his or her employment, notify each beneficiary named in the last statement of the fact; such notice shall be given by sending each beneficiary at the address given in the last statement furnished a copy of such notice by

registered mail, and an envelope containing such notice addressed to each beneficiary at the address given in said last statement furnished, shall be deposited in the post office and registered, within ten days after such employee shall have become deceased.

(d) (NOTIFICATION FORM.) The notice to be given shall be substantially in the following form:

To (giving the name of the beneficiary).

This is to advise you that.....
(giving the name of the deceased person) became deceased on the day of.....
as a result of an injury received while in the employ of..... You will take notice that all persons entitled to benefits because of the fact that the above named employee was injured and as a result thereof became deceased, under the laws of Alaska, are required to serve notice upon the employee with one hundred and twenty (120) days after the date on which such employee became deceased, in accordance with the provisions of the laws of Alaska upon that subject, and that failure to serve such notice within the time specified and in the manner specified will result in depriving the beneficiary, failing to give such notice within such time and in such manner, of his or her rights to compensation under the laws of Alaska.

(e) (FAILURE OF EMPLOYEE TO LIST BENEFICIARIES.) Any failure on the part of the employee to supply the employer with a statement as hereinabove provided shall not work a forfeiture of

the right of his or her beneficiaries to benefits hereunder.

(f) (FAILURE OF EMPLOYER TO NOTIFY BENEFICIARIES.) In cases where the employer shall have been furnished with such statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and manner herein provided, such beneficiaries who have not been so notified shall have the right to notify the employer of their claims to benefits and file claims and prosecute actions or other proceedings for the recovery thereof, notwithstanding the fact that such notice was not served as hereinafter provided within the period of one hundred and twenty (120) days from and after the time the employee became deceased.

(g) (EMPLOYEE'S STATEMENT AS EVIDENCE.) Upon the trial of any issue relating to a beneficiary's right to compensation under this Act, any written statement furnished an employer, as hereinabove provided, may be offered in evidence and shall be prima facie but not conclusive evidence that there are no other beneficiaries.

(h) (NOTICE OF BENEFICIARY'S CLAIM: SERVICE.) In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in such employee's death, someone in his or her behalf shall within one hundred and twenty (120) days from and after the death of such employee serve a written notice upon

the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such persons were dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by delivering a copy thereof to the employer or the employer's agent in person or by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer, or by mailing the same by registered mail, addressed to said employer at his last known business address. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by registered mail upon the Industrial Board, and it shall be the duty of such Industrial Board to publish the same in one issue of any newspaper of general circulation published in the Judicial Division where the injury, out of which the right to compensation arose, occurred. Failure to give such notice shall not bar any claim (1) if the employer or his agent in charge of the business at the place where the injury occurred, or the insurer, had knowledge of

the injury or death and the Industrial Board determines that the employer or insurer has not been prejudiced by the failure to give such notice; or (2) if the Industrial Board finds that there was good cause for not giving such notice; Provided that no objection based on such failure shall be considered unless made at the first hearing of the claim before the Board. In case of doubt as to the proper beneficiaries, the employer shall submit the matter to the determination of the Industrial Board.

§43-3-13. Notice in non-fatal cases: No compensation until notice or knowledge: Defective notice: Prejudice: Contents of notice: Signature and service.

In all cases of injury not resulting in death, unless the employer or his agent shall have actual knowledge of the occurrence of the injury at the time thereof, or shall acquire such knowledge afterward, the injured employee, or someone in his or her behalf, as soon as practicable after the injury, shall give written notice to the employer of such injury, such notice may be given in the manner provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

Unless such notice is given or knowledge acquired within sixty days from the date of the injury, no compensation shall be paid until and from the date such notice is given or knowledge obtained, but no lack of knowledge by the employer or his agent and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer was prejudiced thereby, and then only to the extent of such prejudice.

The notice provided for in this Section shall state the name and address of the employee, the time, place, nature and cause of the injury, and shall be signed by the employee, as provided in paragraph (a) of Section 12 (§ 43-3-12 herein), or by some one in his or her behalf, and served as provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

§ 43-3-14. Rules: Process and procedure to be summary and simple: Powers of board: Subpoenas: Service and fee: Fees and mileage of witnesses. The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof. Process and procedure under this Act shall be as summary and simple as reasonably may be. The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to have examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Subpoenas of the Board shall be served by the marshal, or any deputy marshal, or by a person specially appointed by the marshal. The fees shall be the same as fees now provided by law for like service in civil actions. Each witness who appears in obedience to such subpoena of the Industrial Board shall receive for attendance the fees and mileage for witnesses in civil cases in the courts.

The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper

proceedings, the attendance and testimony of witnesses and the production and examination of books, papers and records.

§ 43-3-15. Procedure in disputed claims: Application for hearing: Fixing time and place of hearing: Where hearing to be held: Determination: Filing award: Copies to parties. If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6 (§ 43-3-6 herein), and afterwards disagree as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined

by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 (§ 43-3-4 herein) nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties.

§ 43-3-16. Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.

§ 43-3-17. Judgment on agreement or award: Effect: Modification: Costs. Any party in interest may file in the District Court for the division in which the employer resides or has his place of business, a certified copy of the memorandum of agreement approved by the Board, or of an order or decision of the Board, or of an award of the full Board unappealed from, or of an award of the full Board affirmed upon an appeal, whereupon said court shall render judgment in

accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment had been rendered in a suit duly heard and determined by said court.

Any such judgment of said District Court unappealed from or affirmed on appeal or modified in obedience to the mandate of the Appellate Court, shall be modified to conform to any decision of the Industrial Board, ending, diminishing or increasing any payment under the provisions of Section 4 of this Act (§ 43-3-4 herein), upon the presentation to it of a certified copy of such decision.

In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.

§43-3-18. Insurance or proof of financial ability: Deposit of security. Every employer under this Act, except those exempted by Section 1 (§ 43-3-1 herein), shall either insure and keep insured his liability hereunder in some insurance company or association duly authorized to transact business of Workmen's Compensation Insurance in the Territory, or shall furnish to the Industrial Board satisfactory proof of his financial ability to pay direct the compensation provided for in this Act. In the latter case the Board may, in its discretion, require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

§ 43-3-19. Filing evidence of compliance: Exception: Failure to comply. Every employer under this Act, except those exempted therefrom by Section 1 (§ 43-3-1 herein), shall, within ten days after this Act takes effect, file with the Industrial Board, in the form prescribed by it, and thereafter within ten days after the termination of his insurance by expiration or cancellation, evidence of his compliance with the insurance provisions of Section 18 (§ 43-3-18 herein) and all others relating to insurance under this Act; provided, that this requirement shall not apply to employers who have procured from the Industrial Board certificates of their financial ability to pay compensation directly without insurance.

Any employer hereafter coming under the compensation provisions of this Act shall, in like manner, file like evidence of such compliance.

If such employer fails, refuses, or neglects to comply with the provisions of this Section, he shall be subject to the penalties provided in Section 24 (§ 43-3-24 herein) for failure to report accidents; but nothing herein contained shall be construed as affecting the rights conferred upon injured employees or their beneficiaries under Section 10.

§ 43-3-20. Self-insurance certificates: Revocation: New certificate. Whenever an employer has complied with the provisions of Section 18 (§ 43-3-18 herein) relating to self-insurance, the Industrial Board shall issue to such employer a certificate which shall remain in force for a period fixed by the Board, but the Board may, upon at least ten days' notice and a hear-

ing, revoke the certificate of such employer upon satisfactory proof that such employer is no longer entitled thereto.

At any time after such revocation the Board may grant a new certificate to the employer, upon his petition and satisfactory proof of his financial ability as provided in Section 18 (§ 43-3-18 herein).

§43-3-21. Insurance policies: Approval by Insurance Commissioner: Presumption of coverage: Limitation of liability: Policy provisions.

(APPROVAL BY INSURANCE COMMISSIONER.) No insurer shall enter into or issue any policy of insurance under this Act until its policy form shall have been submitted to and approved by the Insurance Commissioner. The Insurance Commissioner shall not approve the policy form of any insurance company until such company shall file with it the certificate of the Commissioner of Insurance showing that such company is authorized to transact the business of Workmen's Compensation Insurance in the Territory. The filing of a policy form by any insurance company with the Industrial Board for approval shall constitute, on the part of such company, a conclusive and unqualified acceptance of each and all of the provisions of this Act, and an agreement by it to be bound thereby.

(PRESUMPTION OF COVERAGE.) All policies of insurance companies insuring the payment of compensation under this Act shall be conclusively presumed to cover all the employees and the entire com-

pensation liability of the insured employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such policy or agreement.

(LIMITATION OF LIABILITY VOID.) Any provision in any such policy attempting to limit or modify the liability of the company issuing the same shall be wholly void except as provided in the preceding paragraph.

(REQUIRED POLICY PROVISION.) Every policy of any such company must contain the following provisions:

(a) (EXTENT OF COVERAGE.) The insurer hereby assumes in full all the obligations to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicine, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits imposed upon the insured under the provisions of the Alaska Workmen's Compensation Law.

(b) (SUBJECTION TO ACT.) That the policy is made subject to the provisions of the Alaska Workmen's Compensation Law, and the provisions of said Act relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits to and for said em-

ployees or beneficiaries, the acceptance of such liability by the insured employer, the adjustment, trial and adjudication of claims for such physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits and the liability of the insurer to pay the same are and shall be a part of this policy contract as fully and completely as if written herein.

(c) (NOTICE TO EMPLOYER.) That, as between the insurer and the employee or his or her beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be notice or knowledge thereof, as the case may be, on the part of the insurer; that the jurisdiction of the insured employer for the purpose of the Alaska Workmen's Compensation Act shall be the jurisdiction of the insurer, and the insurer shall, in all things, be bound by and shall be subject to the orders, awards, judgments and decrees rendered against the insured employer under said Act.

(d) (CONDITIONS OF PAYMENT.) That the insurer will promptly pay to the person or persons entitled to the same, all benefits conferred by the Alaska Workmen's Compensation Act, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits that

may be awarded or agreed upon under said Act; that the obligation of the insurer shall not be affected by any default of the insured employer after the injury, or by any default in giving of any notice required by this policy; that the policy is and shall be construed to be a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, and shall be enforceable in the name of such person or persons.

(e) (NOTICE OF TERMINATION.) That any termination of the policy by cancellation shall not be effective as to the employees of the insured employer covered thereby until ten days after written notice of such termination has been received by the Industrial Board. Provided, however, that if the employer has secured insurance with another insurance carrier, cancellation shall be effective as of the date of such other coverage.

(f) (JOINT LIABILITY.) That all claims for compensation, death benefits, physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, may be made directly against either the employer or the insurer, or both, and the order or award of the Industrial Board may be made against either the employer or the insurer or both.

(g) (REVOCATION BY COMMISSIONER.)

That if any insurer shall fail or refuse to pay any final award or judgment (except during the pendency of an appeal) rendered against it, or its insured, or, if it shall fail or refuse to comply with any provisions of this Act, the Insurance Commissioner shall revoke the approval of the policy form, and shall not accept any further proofs of insurance from it until it shall have paid said award or judgment or complied with the violated provision of this Act, and shall have re-submitted its policy form and received the approval thereof by the Insurance Commissioner.

§ 43-3-22. Award to be final and conclusive: Questions of fact: Injunction proceedings: Certification of questions by Board: Advancement on docket: Early determination: Increase in award. An award of the Board, by less than all of the members, as provided in Section 15 (§ 43-3-15 herein), if not reviewed as provided in Section 16 (§ 43-3-16, herein), shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if such award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the district in which the injury occurred. The orders, writs and processes of the court in such proceeding may run, be served, and

be returned in accordance with the rules of said court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an interlocutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage.

The Board, of its own motion, may certify questions of law to said court for its decision and determination.

All such appeals and certified questions of law shall be advanced upon the docket of said court, and shall be determined at the earliest practicable date, without extensions of time for filing briefs.

Any award of the full Board affirmed on court review at the instance of the employer or his insurance carrier may be increased ten per centum by order of the court.

§ 43-3-23. Fees of attorneys and physicians: Approval: Statement of attorney's fees: Effect and payment: Report by physician. The fees of attorneys and physicians, and the charges of nurses and hospitals,

for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fee. The fee so fixed shall be binding upon both the claimant and his or her attorney, and the employer shall pay to the attorney out of the award, the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. The Industrial Board may withhold the approval of the fees of the attending physician in any case until he shall file a report with the Industrial Board on the form prescribed by such Board.

§ 43-3-24. Records and reports of injuries: Contents of report: Violations as misdemeanor: Punishment. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within one week after occurrence and knowledge thereof, as provided in Sections 12 and 13 (§§ 43-3-12, 43-3-13 herein) of an injury to an employee causing his or her death or absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Board on blanks to be procured from the Board for the purpose.

The said report shall contain the name, nature and location of the business of the employer, the name, age, sex, wages, occupation of the injured employee, the date and hour of the injury and the nature and

cause thereof, and such other information as may be required by the Industrial Board.

Whoever shall fail or refuse to comply with the foregoing provisions, or whoever shall violate any of the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than Fifty Dollars nor more than Five Hundred Dollars.

§ 43-3-25. Jurisdiction of courts. No court of this Territory except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties.

§ 43-3-26. Attachment: Procedure: Affidavit: Contents: Insurance of writ without bond: Form, service, execution and return: Undertaking by defendant: Effect.

(a) (AFFIDAVIT: CONTENTS.) A writ of attachment shall be issued by the Clerk of the Court in which any action for the recovery of damages under the provisions of Section 10 (§ 43-3-10 herein) is pending, or by the United States Commissioner in any such action pending in the court of such Commissioner. Whenever the plaintiff or anyone in his behalf shall make and file an affidavit showing that he or she is entitled to recover compensation from the

defendant, under the provisions hereof, but that such defendant has failed to comply with the provisions of Sections 18 and 19 of this Act (§§ 43-3-18, 43-3-19 herein), and the certificate of the Industrial Board to that effect shall be prima facie evidence of the fact, such affidavit must show all the facts necessary to bring the plaintiff within the provisions hereof, and must further set up all the facts necessary to show that a cause of action exists in favor of the plaintiff and against the defendant for the amount sued for and for which the attachment is sought under the provisions hereof.

(b) (ISSUANCE OF WRIT WITHOUT BOND: FORM, SERVICE, EXECUTION AND RETURN.)

Upon filing such affidavit in actions pending as aforesaid with the Clerk of the Court, or, the Commissioner, in actions pending in the court of such Commissioner, the plaintiff shall be entitled to have a writ of attachment issued without filing any bond or other security such writ shall be directed to the marshal and shall in all respects conform to writs of attachment in other cases and shall be issued, served, executed and returned in the same manner that writs of attachment in other cases are now issued, executed and returned.

(c) (UNDERTAKING BY DEFENDANT: EFFECT.) The defendant may, however, file a written undertaking in any pending cause for the benefit of the plaintiff in an amount equal to double the amount sued for, executed by two or more sufficient sureties, to be approved by the Judge or Commissioner in

whose court the action is pending and conditioned that the defendant will pay any judgment that may be awarded against such defendant in the action. No writ of attachment shall issue after such undertaking has been filed by the defendant, and if such undertaking shall be filed after the writ has been issued, such writ shall be quashed and if property has been attached under such writ at the time of the filing of such undertaking, such attachment shall be dissolved and set aside and the property attached and (sic) returned to the defendant.

§ 43-3-27. Physical examination: Submission to: Presence of employee's physician: Privilege: Refusal to submit to examination: Effect: Autopsy: Notice to widow or next of kin. The employee shall after an injury at reasonable times during the continuance of his or her disability, if so requested by his or her employer, or when ordered by the Industrial Board, submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory or State in which such employee may be found, furnished and paid for by the employer, or by the Board. The employee shall have the right to have a physician, provided and paid for by himself or herself, present at such examination or examinations. No fact communicated to, or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in the hearings provided for in this Act, or any action to recover damages against any em-

ployer who is subject to the compensation provisions of this Act. If any employee refused to submit himself or herself to any such examination to examinations provided for herein, his or her rights to compensation shall be suspended until such obstruction or refusal ceases, and his or her compensation, during such period of suspension, may, in the discretion of the Industrial Board, or the court determining an action brought for the recovery of damages hereunder, be forfeited.

The employer, or the Industrial Board, shall have the right in any case of death to require an autopsy at the expense of the party requesting same.

No autopsy shall be held in any case without notice first being given to the widow or next of kin, if they reside in the Territory, or their whereabouts can reasonably be ascertained, of the time and place thereof and reasonable time and opportunity given such widow or next of kin to have a representative present to witness the autopsy shall be suppressed on motion duly made to the Industrial Board, or to the Court, as the case may be.

§ 43-3-28. Waiver or exemption from statute forbidden. No agreement by an employee to waive his or her rights to compensation under this Act shall be valid, except as herein elsewhere provided, and no employer or employee shall exempt himself, herself or itself, except in the manner herein elsewhere provided, from the burden or waive the benefits of this Act, by any contract, agreement, rule, regulation or

device, and any such contract, agreement, rule, regulation or device shall be absolutely void.

§ 43-3-29. Claims barred if not filed within two years. Any and all claims for compensation hereunder shall be barred unless a claim for compensation shall be filed with the Industrial Board within two years after the injury, or, if death results therefrom, within two years after such death, after the injury was sustained, or, in the event of mental incapacity, within two years after the removal of such mental incapacity.

§ 43-3-30. Liability of third persons: Proceedings by employer: Subrogation to employee. Where the injury for which compensation is payable hereunder was caused under circumstances creating a legal liability in someone other than the employer to pay damages in respect thereof, the employee may take proceedings against the one so liable to pay damages and against any one liable to pay compensation under this Act, but shall not be entitled to receive both damages and compensation. And if the employee has been paid compensation under this Act, the employer by whom the compensation was paid shall be entitled to indemnity from the person, firm or corporation so liable to pay damages as aforesaid and to the extent of such indemnity shall be subrogated to the rights of the employee to recover damages therefor.

§ 43-3-31. Report of termination of compensation. Every employer paying compensation directly without insurance, and every insurance carrier paying compensation in behalf of an employer, shall, within ten

days from the termination of the compensation period fixed in any award against him or its insured, for an injury or death, either by the approval of an agreement or upon hearing, and within ten days from the full redemption of any such approved agreement or award, by the cash payment thereof in a lump sum or otherwise, as in this Act or by the order or award of the Industrial Board provided, shall make such report or reports as the Industrial Board may require.

§ 43-3-32. Failure to secure payment: Common law defenses abolished: Presumptions. If such employer fails to provide security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employee assumed the risks inherent to or incidental to or arising out of his or her employment or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of an employer to furnish reasonably safe tools or appliances, or because the employer exercises reasonable care in selecting reasonably competent employees in the business;

(2) That the injury was caused by the negligence of a coemployee.

(3) That the employee was negligent, unless and except it shall appear that such negligence was wilful

and with intent to cause the injury, or was the result of wilful intoxication on the part of the injured party;

(4) In such actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has failed to provide the security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), it shall be presumed that the injury to the employee was the first result growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence.

§ 43-3-33. Presumption of direct payment: Notice: Posting: Places of posting: Form of notice. Every such employer shall be conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employ- according to the provisions hereof, unless and until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, shall have been given to the employee. Such notice shall be posted and kept on the premises of the employer or on the premises where the employer's operations are being carried on in three conspicuous places; one of which shall be at the office of the employer; one at the mess house or boarding house, if there be one, and the third in some conspicuous place on the premises or works. Such recorded and posted notice shall be substantially in the

following form, and the signature shall be witnessed by two witnesses:

EMPLOYER'S NOTICE OF INSURANCE

To the employees of the undersigned:

You and each of you are hereby notified that the undersigned is insured in the.....Insurance Company, whose address is.....and that the period covered by such insurance is.....in accordance with the terms, conditions and provisions to pay compensation to employees of the undersigned for injuries received as provided in the Act of the Territory of Alaska, known as the "Workmen's Compensation Act of the Territory of Alaska." (Signed).....

Witnesses:

§ 43-3-34. Article to be part of every contract of hire: Construction. This article shall constitute part of every contract of hire, express or implied, and the same shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner hereby provided for all personal injuries sustained, arising out of and in the course of employment.

§ 43-3-35. When excluded employee presumed to accept compensation under this Act: Voluntary Insurance. All employees excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein) shall be conclusively presumed to have elected to take compensa-

tion in accordance with the provisions of Section 33 (§ 43-3-33 herein) in the following cases.

(a) In the event that any employer who employs a person or persons in domestic service, or who is engaged in agriculture, dairying, or the operation of railroads as common carriers, and is, therefore, by reason of the provisions of Section 1 (§ 43-3-1 herein) excluded from the terms, conditions and provisions hereof, voluntarily obtains insurance for the protection of his or its employees for injuries arising out of and in the course of the employment, the rights and remedies hereof shall apply where an employee brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his or her employment, and such employee shall be and remain subject to the provisions hereof the same as if such employment had not been excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein).

§ 43-3-36. Alaska Industrial Board created: Members: Chairman: Powers. A Board is hereby created which shall be known as the "Alaska Industrial Board," to be composed of the following three members: The Territorial Insurance Commissioner, the Attorney General and the Territorial Commissioner of Labor. The Commissioner of Labor shall be Chairman of the Alaska Industrial Board, and shall be the executive officer of the Board, and shall be empowered to perform all acts necessary to carry into effect all provisions of this Act.

§ 43-3-37. Assignment of claim: Waiver of exemption. No claim for compensation, or compensation agreed upon, awarded, adjudged, or paid, shall be assignable, or subject to levy, execution, attachment, garnishment, or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

§ 43-3-38. Definition of terms. Wherever the term “employer” is used in this Act, reference is had to the Territory or any of its political subdivisions and to any person or persons, partnership, joint stock company, association or corporation employing three or more persons in connection with any business or industry coming within the scope hereof and carried on in this Territory, and whenever the term “employee” is used herein, reference is had to an employee employed by an employer as above defined.

If the employer is insured, the term “employer” shall include the insurer so far as applicable.

The term “beneficiary” as used herein refers to any person entitled to compensation under the provisions hereof.

The masculine gender, whenever used herein, shall be held to include the feminine and neuter.

For the purpose of this Act, “child” or “children” shall mean a child or children under the age of eighteen years depending upon the injured employee for support.

“Widower” shall include one who is divorced and is not required by decree of divorce to contribute to the support of his former wife.

“Married” shall include one who is divorced but is required by the decree of divorce to contribute to the support of his former wife.

The term “injury” or “personal injury” means an injury by accident arising out of and in the course of employment, including any disease proximately caused by the employment, which is due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process or employment, and to exclude all ordinary diseases of life to which the general public are exposed; including, also, any injury caused by the wilful act of a third person directed against the employees because of his or her employment, but shall not include injuries caused by the employee’s wilful intention to injure himself or herself or to injure another or caused by his or her wilful intoxication.

§ 43-3-39. Title of Act. This Act shall be cited as “The Workmen’s Compensation Act of Alaska.”

§ 43-3-40. Separability of Provisions. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 43-3-41. Laws Repealed. This Act shall supersede and repeal all other laws of the Territory relat-

ing to Workmen's Compensation, and Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska 1933,^a as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937, are specifically repealed."

^aFormerly Chapter 25, Session Laws of Alaska 1929.

Appendix B

UNITED STATES OF AMERICA,
TERRITORY OF ALASKA.—SS.

R. E. ROBERTSON, being first duly sworn on oath deposes and says I am attorney for the appellant; that in the absence of the record so showing I state:

(a) Lathourakis' deposition was taken before one or more members of the Board on May 26, 1949.

(b) The hearing was held before the full Board on August 30, 1949.

(c) The Board made its decision and award on September 28, 1949, but the Board did not notify the appellant thereof until October 1, 1949.

(d) Appellant's complaint and appeal was filed with the Clerk of the District Court for the Third Judicial Division on October 27, 1949.

R. E. ROBERTSON.

Subscribed and sworn to before me this 15th day of August, 1950, in Juneau, Alaska.

(Seal)

F. O. EASTAUGH,

Notary Public for the Territory of Alaska.

My commission expires June 10, 1954.

No. 12562

IN THE
United States Court of Appeals
For the Ninth Circuit

LIBBY, MCNEILL & LIBBY,
a corporation,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD and
PETER LATHOURAKIS,

Appellees,

FILED

OCT - 2 1950

PAUL P. O'BRIEN,
CLERK

Upon Appeal from the District Court for the
Territory of Alaska, First Division

BRIEF FOR APPELLEES

J. GERALD WILLIAMS and
JOHN DIMOND
for Alaska Industrial Board.

ROY E. JACKSON and
HENRY RODEN,
for Appellant Lathourakis.

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Upon Appeal from the District Court for the
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BRIEF FOR APPELLEES

STATEMENT OF FACTS.

Since appellant's brief does not include all the facts which appellees consider relevant, a brief statement follows:

Prior to 1948 the Appellee Lathourakis had been a commercial fisherman for some twenty years. In the spring of 1948, after being examined by the appellant's physician in Seattle, appellant sent him to Bris-

tol Bay, Alaska, there to catch fish to be processed at its salmon cannery at Libbyville. On July 16, 1948, while engaged in fishing, he was injured in collisions between his fishing boat and a fish barge, sustaining severe injuries to his right arm and chest. After being extricated from the position in which he had been pinned, took a drink of gin and immediately vomited. He was taken to the emergency hospitals at Libbyville and Koggiung. On July 23, he was flown to Seattle for further treatment. There he was examined by a number of physicians and informed that, in their opinion, he was suffering from cancer; surgery was suggested which he declined. After remaining in the Marine Hospital at Seattle for several weeks he went home. Upon the advice of Doctor Gray and the solicitation of members of his family he returned to the hospital and, on October 7, submitted to an operation for cancer.

The operation required the removal of a rib; the opening of the chest, collapsing of a lung and splitting of the diaphragm. No cancer was found; the position of his stomach was then changed by elevating it up to the middle third of the esophagus and the two were sewn together; the diaphragm was then sewn to the side of the stomach and the stomach itself to the vertebral column and the chest wall. No cancer being present the physicians changed their diagnosis to a conclusion that the patient was suffering from a congenital malformation of the esophagus.

From the moment of the accidental injury to the time of the hearing of his application for compen-

sation before the Alaska Industrial Board Lathourakis was unable to swallow solid food; his right arm continued numb and he was suffering other and additional disabilities as a result of the accident of which we shall speak later in this brief.

The Industrial Board awarded him temporary compensation up to May 20th, 1949, at the rate prescribed by the statute and permanent partial disability compensation equal to fifty per cent as for total-permanent disability.

On appeal from the Board's decision the District Court affirmed the award. From this affirmance this appeal is prosecuted.

On its appeal to the lower court the appellant raised the same points he relies on here for reversal. The learned District Judge found none of them well taken.

ARGUMENT

In its brief the appellant makes three points:

First: That the Alaska Industrial Board may not base its Findings upon hearsay or ex parte testimony.

Second: That under the Alaska Workmen's Compensation Act the Board cannot award for the same injury, both temporary and permanent disability compensation, and

Third: That an attorney's fee cannot be assessed against the losing party on an appeal from the Board's decision to the District Court.

We shall consider these points in the order stated.

First: Competent Evidence

We agree that the Findings of the Board must be supported by competent evidence and respectfully suggest that such evidence is in the record. In order to make out his case the injured employee is required to show that the relation of employer and employee existed at the time of the accident and that it arose out of and in the course of his employment.

Both these facts are admitted by appellant in its "Admission of Service and Answer to Application for Compensation." Tr. Pg. 11.

The employee is further required to establish the fact that as a result of the accident he sustained temporary and, if claimed, partial permanent disability.

The Industrial Board found that the employee was temporarily disabled from the time of the accident, July 16, 1948, to the 20th day of May 1949.

This Finding is supported by the following evidence:

"Before the accident I weighed 190 pounds; now, on May 26, 1949, I weigh 156. I cannot gain weight because I cannot eat much solid food and I can't sleep well. I can eat hamburgers and fish. I cannot eat ordinary food because I can't get them down; sometimes I throw whole thing up. I have to take medicine before meals and have to eat 5 or 6 times a day. I can only walk two or three blocks on the level and only one block on the hill. My right arm is numb; it pains when I do a little work around (my) boat on doctor's orders. I have very little grip in the right hand now and two fingers are numb"; Tr. pg. 27; "I

vomited last time two weeks ago;" Tr. pg. 29; "cannot eat things like beefsteak, pork chops or the like; I still feel pretty weak." Tr. pg. 33.

To show that the temporary disability continued beyond the time fixed therefor by the Board, we refer to the testimony of Doctor McGowan, a witness for Appellant who testified, on July 6, 1949, when his deposition was taken as follows:

Q. How much was he disabled when you saw him last?

A. I have not seen him for a month so I cannot tell.

Q. But you would assume it would be more than twenty or thirty per cent?

A. Yes.

Q. Around thirty to forty?

A. I would assume it be around forty per cent. Tr. pg. 81.

Again, on re-direct examination by appellant's counsel, he testified:

Q. When Lathourakis has completely convalesced, if he had not when you saw him, would you give any opinion as to any permanent disability which would remain in him?

A. Yes, sir, I think he will have a definite partial disability.

Q. In terms of a man being able to work, could you give us any percentage?

A. I would rate Mr. Lathourakis at the present time, or, excuse me, at the time of his complete convalescence as being between twenty to thirty per cent disabled. Tr. pg. 80, 81.

Permanent Partial Disability

The evidence shows conclusively that as a strong and active man Lathourakis started fishing for the Appellant when the 1948 season opened in Bristol Bay. On July 16, seeing that a collision between his fishing boat and a near-by barge was inevitable he jumped from the bow of his boat into the forecastle and, to avoid drowning, he clung to the mast with his right arm around it; his boat hit the barge at a speed of 25 miles per hour. The topside of the barge hit his head, arm and chest. He then dropped into the fore-castle. Tr. pg. 22.

He took a little drink of gin "which we keep on the boat for cold weather and right away vomited." Tr. pg. 23. "My arm and chest were black and blue and numb." Was taken to hospital and cleaned up as "I was all bloody." After five days at the local hospital he was flown to Seattle for further medical attention. His wife was advised that it was the concensus of opinion of several physicians that he was suffering from carcinoma, the medical term for cancer, and that without immediate surgery he would die. Tr. pg. 24, 102.

The operation for "cancer" was performed on October 11, 1948; no carcinoma was found and the expert physicians found their diagnosis to have been wrong.

They did find that the walls of his esophagus were abnormally thick and that this condition was congenital.

“Before the accident I was strong enough for two men.” Tr. pg. 26; “I was high boat in 1946 and 1947 in Bristol Bay; I have the best boat on Puget Sound; I could easily earn from five to eight thousand dollars a year;” Tr. pg. 31; “Before the accident I had no trouble about eating.” Tr. pg. 31;

“I never consulted a doctor in my life except for physical examination.” Tr. pg. 33; “I am unable to walk more than two or three blocks on the level and but one on the hill; have only little grip in the right hand and two fingers are numb; my breathing is not very good; cannot do one third as much work as I did before the accident.” Tr. pg. 27; and “don’t think even a good friend would hire me in the condition I’m in. I got no strength—no nothing.” Tr. pg. 27;

Suffers from shortness of breath; Deposition of Doctor McGowan, Tr. pg. 79.

This evidence is corroborated by that of Fred Sheils, who testified:

“I have known him since 1943, during which time he engaged in fishing; he was high boat man and was always very active; his physical condition was very good; he was a strong powerful man; he fished for me in 1949; we lived on the same ship; he was not the same man he was a year ago; he got tired after doing very little work; he could not do his share of the work and I had one of the deck hands help him as he could not lift his arms high enough to do it. He was supposed to do that kind of work himself. He was not able to do equal work with his partner;

his partner had to do two-thirds of all the work. From the work he was able to do this year it's hard to say whether I would employ him again next year; I took him this year because he was a good friend of mine; I don't think he would get the same consideration from someone else. I didn't let him work after the season as fishermen are supposed to do to earn their run money. He was all in so I told him to take it easy." Tr. pg. 33 et seq.

In addition to the foregoing testimony it is proper to call the Court's attention to the fact that the injured employee appeared before the Industrial Board in person. The Board had an opportunity to consider the appearance and demeanor of the claimant and of his seeming health and ability to work. The inspection of a witness is often an important factor in the weight to be given to his statements and such observation as constitutes additional evidence upon which a Finding may be predicated and justifies a Finding as to the nature of an injury even though the Record may be otherwise bare as to that phase.

We take the liberty of suggesting here that the Alaska Industrial Board, which understands local conditions and on account of its constant contact with fishermen in this Territory, must be credited with having knowledge as to what is required of them in the performance of their work and where one such man is partially disabled for work can state what amount he would or could be earning, taking into consideration the nature of his injuries.

The appellant's physician, Doctor Gray, on page 103 and 104, of the Transcript expresses the view that the

employee's condition may be due to the accident. He states:

Q. I would like to ask you to assume that the fright, the regurgitation, the numbness that he felt in his chest down his stomach, and then the lack of ability to swallow, if it is not reasonable to assume that all these symptoms that followed this accident, up to the time of the operation, are the result of this accident?

A. If the symptoms are due to spasm alone, then I feel that it is reasonable to assume with that definite history that this symptom of difficulty of swallowing is due to the injury, but from my knowledge of what has transpired and what the findings were, I feel that he had a pre-existing condition; so I cannot lay *all* the symptoms due to the injury, and this spasm could follow fright and an injury to the chest, such as he had, under the conditions that he had."

And, testifying as to possible aggravation of a pre-existing abnormal esophagus, the same physician testified:

Q. Could the spasm of the esophagus, together with the regurgitation that followed aggravate an organic lesion in the esophagus?

A. It could. Tr. pg. 108.

We have here a frank statement by appellant's physician that in his opinion he does not feel that he can ascribe the employee's incapacity as being due wholly to the accident; but that it contributed thereto by aggravating a prediseased condition and that the combination of the two resulted in the incapacity.

Anchor Casualty Co. vs. Wolf, 181 Fed. (2) 741.

Bearing in mind the proofs concerning his good health, that he had never needed advice of a physician, had worked hard year in and year out, had no complaint of any kind up to the moment of the accident yet from that moment on he has been seriously disabled, can it be denied that he has established, by a preponderance of the probabilities according to the experience of mankind, that there was causal connection between the accident and his subsequent condition?

Dobin vs. Crucible Steel Co., 51 At. (2) 434.

The record does not show any previous illness due to the condition of his esophagus or treatment therefor; if it was malformed it had never prevented him from going about his daily tasks for many long years, without interruption and undisturbed thereby. One day he has a violent collision from which he suffers great pain and injuries in and to his body and limbs; from this the deduction is forced upon an unprejudiced mind that the shock and effect of the collision was responsible for the resultant condition.

Reasonable probability, not absolute certainty is sufficient.

Pacific Employers vs. Ind. Board, 122 Pac. (2) 570.

Appellant's physicians claim the malformation of his esophagus is congenital—if so it did not prevent him from being a useful soldier in the First World War. Tr. pg. 32.

What is there to indicate that his present condition is due to the malformation of his esophagus? Nothing.

The experts, at one time, expressed the opinion the man was suffering from cancer. Had he died they would have certified, under their hand and seal, that in their opinion cancer to be the cause of his death and the claimant would have been buried as well as their mistake.

It will hardly be claimed that the condition of his esophagus caused the regurgitations right after the accident; that it made his arm and chest black and blue; that it made him to become covered with blood; that it caused his instability, lack of stamina and grip in his right arm, and that he is no longer as "strong as two men and can only do about one third of the work he was able to perform before the accident."

"Where there is such close connection between the accident and injury so as to satisfy a reasonable person as to the cause of the injury, the relation between the two is sufficiently shown; the sequence of events strongly indicates the causal connection between the entirely unexpected injury and the continued disability following it."

Saylor vs. Greenville Car Co., 43 At. (2) 633.

The modern concept is that it is enough if the preponderance of probabilities according to the experience of mankind point to causal relation.

The argument as to whom to believe may be urged before the Industrial Board but has no place on appeal.

It was for the Board to say what testimony it would believe or reject.

“The claimant testified he had not recovered; the doctor said he had.” The award was sustained; the Board could disbelieve the doctor.

Florence Citrus vs. Parrish, 36 So. (2) 369.

Even though the only doctor who testified stated there was no causal connection, an award may stand as the doctor may be disbelieved, and causal connection be inferred from the rest of the evidence.

Wallace vs. Hogue, et al., 185 Pac. (2) 711; quoted in 201 Pac. (2) 106.

We respectfully suggest that the evidence, thus far referred to is amply sufficient to justify the trial court's conclusion that the Findings of the Board were supported by competent evidence. Proof of the causal connection between the accident and the resulting incapacity is fully established, not only by reasonable inferences which may fairly be drawn from the evidence but by direct proof.

“Applicant's evidence as to his condition has probative value. While he cannot make prognosis he can state facts as to his condition and these may be of such a nature as to enable the Board to determine the extent and duration of his inability even in the absence of medical evidence.”

Yocum Creek Coal Co. vs. Jones, 214 S.W. (2) 410.

“Testimony of injured person may be believed in preference to the opinion of a whole college of physicians.”

Atlantic Steel Co. vs. McLarty, 39 S.E. (2) 733.

Admission of Physicians' Reports.

We believe that the evidence of the claimant himself and of his witness Sheils with the fair and reasonable inferences that may be drawn from it, fairly shows that the accident was the cause of the incapacity; add to this the testimony of appellant's Doctor Gray that the accident, though not wholly responsible for it in his opinion aggravated a pre-existing condition and that the two together brought about the incapacity of the claimant, and we have an unassailable case.

In addition to the testimony thus far dealt with, the employee introduced in evidence the statements of two physicians who examined him, Doctors Williams and Slyfield.

In his statement under date of March 23, 1949, Doctor Williams says: (Tr. pg. 117) After setting forth the complaints made by the patient, which are the same as those made by him to appellant's physicians and to the Industrial Board at the time of the hearing, the doctor states:

"Examination shows that he has lost 45 pounds since the operation and has regained about 20 pounds in the past two months. There is limitation of motion of the left rib cage, and under the fluoroscope the left diaphragm is elevated and the lower lobe of the lung appears partly collapsed.

"Grip in the right hand is decreased to approximately 40% of that in the left hand. The numbness of the fingers of which he complains can be explained by medial and radial nerve damage in the forearm.

"The man in his actions and appearance gives an impression of general weakness. This has been produced by the effects of the accidental injuries and by the strain and shock of the operation.

"In my opinion the history of the accident and the man's history, together with the ex-ray and pathological evidence and the findings at operation, indicate convincingly that the accident was the responsible cause for the esophageal injury probably by bruising of the esophagus by the mediastinal contents as a result of the impact. He has suffered permanent disability as a result of the injuries sustained in his accident of July 16, 1948. The disability resulting from the chest injury and subsequent necessary surgical work is estimated at 65% of the maximum for unspecified permanent partial disability, and that of the major forearm at 20% of the amputation value of the major upper extremity at the elbow. It is expected that some strength of grip will be regained in the forearm with increased use and that some improvement of the present state of general weakness will ensue. This is taken into consideration in the above ratings. Otherwise I feel his condition is fixed at this time. The man has been totally disabled for work since the date of injury and is still disabled for any but the lightest kind of work."

Doctor Slyfield, after repeating the history given him by the claimant, which is the same as appears throughout the case, states: Tr. pg. 115:

"From my study as to the cause of this misfortune many etiological features might be conjectured. One cannot avoid being seriously influenced by the history. Lathourakis had no complaints up to the moment of the accident, yet immediately after it the train of symptoms arose which clearly led to the disaster on which claimant bases his complaint. I do not assert profic-

iciency in disturbances of the esophagus, but the story, the findings at the operation, the pathological report and the present condition are, to me, convincing evidence that the accident was responsible for the chain of events."

The appellant claims these statements should not have been considered by the Board.

The Alaska Workmen's Compensation Act, section 43-3-13, Alaska Compiled Laws, 1949, reads:

"The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof."

Pursuant to this authority, the Industrial Board, among others, adopted its Rule Number 13, which reads:

"The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence. Hearsay evidence shall be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient of itself to support a finding." Article 9(c), of the Rules adopted by the Industrial Board reads:

"The Board favors the production of medical evidence in the form of written reports. These reports should include:

1. History of the injury;
2. Source of all facts set forth in the history and complaints;
3. Findings on examination;

4. The patient's complaint;
5. Opinion as to the extent of disability and working ability;
6. Cause of the disability;
7. Medical treatment indicated;
8. Likelihood of permanent disability;
9. If permanent disability exists whether it is ready for rating;
10. The reasons for opinions."

"Article 9(d). Upon the filing with the Board an application or other pleading, all parties must immediately, or in any event, within five days after service of such pleading, send to the Board the original signed reports of all physicians relating to the proceedings which they may have in their possession or under their control. Copies shall be served forthwith on the adverse party.

"Article 9(e). All physicians' reports acquired by any of the parties during the pendency of the particular phase of the proceeding shall immediately, or in any event within five days of receipt, be sent to the Board and copies served on the adverse party.

"Article 9(h). If a party fails or refuses to comply with the foregoing provisions the Board may decline to receive in evidence any physician's report or other written testimony from a physician whose report has not been so filed. It shall be presumed that the report of evidence withheld in violation of said sections was wilfully suppressed and would be adverse if produced."

The statute just quoted deals with procedure only and not with any substantive rights and pursuant to it, the Board has authority to prescribe fair and reasonable rules and methods to be followed in proceed-

ings pending before it. The reports of the two physicians were presented in accordance with these rules and the Board had the right to consider or reject them.

Under the common law of procedure substantive rights are governed by procedure; but this has been changed by the enactment of workmen's compensation acts; under them substantive rights control procedure and common law principles are not applicable.

The reports by the doctors, required as aforesaid, become part of the Board's file and constitute a part of the record and may be considered by the Board though the sources of information on which they are based and the manner in which they become part of the file might affect their weight as evidence, they are nevertheless competent and admissible to be considered for what they are worth.

Devlin vs. Department of Labor 78 Pac. (2) 952.

"The manner in which they get into the record may affect their weight as evidence but, in our opinion, are not incompetent and may be considered by the Board for what they are worth."

McKinzie vs. Department of Labor, 37 Pac. (2) 218.

We respectfully repeat, that the record supports the Findings of the Board as found by the District Court.

The situation here is fully covered by the opinion of this Honorable Court in:

Contractors vs. Pillsbury, 150 Fed. (2) at page 312 where the Court, speaking by Honorable Circuit Judge Bone says:

“There was evidence covering material facts before the Commissioner which would support the order of award. Logical deductions and inferences which may be and are drawn by him from the evidence should be taken as established facts and are not judicially reviewable. Even if the evidence permits conflicting inferences the inference drawn by the Commissioner is not subject to review and will not be re-weighed. The Commissioner is not bound to accept the opinion or theory of any particular medical expert but he may rely upon his own observation and judgment in conjunction with all of the evidence before him.”

We repeat that we do not contend that hearsay testimony alone is sufficient to support a material Finding of the Board; but the Board may consider it when it is sustained by other competent evidence.

Appellant, in its Brief, cites a number of authorities holding that hearsay evidence alone is not sufficient to establish the essential facts of an accidental injury, such as:

Lallier Construction Co. vs. Industrial Commission, 172 Pac. (2) 534, and others among them:

Employers etc. vs. Industrial A. C., 151 Pac. 423.

It will be noted that the holding in all these cases is that “hearsay evidence alone” is not sufficient, plainly indicating that, to a degree, it is admissible under the Workmen’s Compensation Acts and will be

given such weight as the hearing authority may deem it entitled to.

Point Two

Under Alaska Workmen's Compensation Act, Board can award temporary and permanent disability arising out of same injury.

The subsection of §43-3-1 of the Alaska Workmen's Compensation Act, dealing with the compensation for injuries causing temporary disability, reads as follows:

“For all injuries causing temporary disability, the employer shall pay the employee, during the period of disability, sixty-five per cent of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid shall be in addition to the amount to which he shall be entitled under such provision in this schedule.”

The foregoing is followed by a provision dealing with the amount payable to an employee who is either partially or totally permanently disabled.

For argument upon this point we confine ourselves to repeating the opinion of the able District Judge of the First Division of Alaska, who says in his opinion in this case, at pg. 122, of the Transcript: “The remaining contention: “That allowance for temporary and permanent disability may not be cumulated, is based upon an analysis and reconstruction of the Workmen's Compensation Statute. Section 431-1-39

ACLA 1949, which, though plausible, appears to rest largely upon conjecture and speculation as to legislative intent. It may be granted that the language of the Act is somewhat inept, ambiguous and inconsistent and that it encourages malingering for the purpose of prolonging temporary disability payments, but in my opinion it is not reasonably susceptible of the construction urged by plaintiff, and in any event, doubts must be resolved in favor of the employee."

Point Three

Recovery of Attorney's Fee on Appeal.

The applicable provisions of the Alaska Workmen's Compensation Act read:

Section 43-3-17 ACL 1949:

"In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court."

Costs in ordinary civil suits are governed by Section 55-11-51:

"The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney's fees in maintaining the action or defense thereto, which allowances are termed costs."

The court in Alaska has consistently allowed attorney fees as costs to the prevailing party, generally.

Pilgrim vs. Grant, 9 Alaska Reports 417.

And this Court has allowed attorney fees as costs.

Forno vs. Coyle, 75 Fed. (2) 692.

The District Court for the First Division of Alaska, has uniformly allowed attorney's fees as costs in appeals coming before it from the Industrial Board, viz:

J. H. Scott, vs. Alaska Industrial Board and Edward Erickson, decided June 10, 1950.

In conclusion we desire to repeat, what the Supreme Court of the United States, has stated in:

Tenant vs. Peoria Ry. Co., 321, 29, at pg. 35.

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury, on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal points of judicial review is the reasonableness of the particular inferences or conclusions drawn by the jury. It is the jury, not the court, which is the fact finding body."

In the case at bar the Industrial Board was the fact finding body; its findings were supported by the finding of the District Court. We respectfully urge that the judgment of the District Court be sustained.

Respectfully submitted,

J. G. WILLIAMS and JOHN DIMOND
for Appellee Alaska Industrial Board
and R. E. JACKSON and HENRY RODEN
for Appellee Lathourakis

No. 12,562

IN THE

United States Court of Appeals
For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation),
Appellant,

VS.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commis-
sioner, Attorney General of Alaska
and the Territorial Commissioner of
Labor, and PETER LATHOURAKIS,
Appellees.

APPELLANT'S REPLY BRIEF.

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Appellees.

APPELLANT'S REPLY BRIEF.

Appellant particularly objects to appellees' statement of facts (Appellees' Brief pp. 1 to 3) because that statement does not confine itself to facts alone, but includes appellees' conclusions upon which they base their contention that the lower Court's judgment should be sustained, for instance:

The evidence does not show that Lathourakis sustained severe injuries to his chest or that those to his right arm were of such severity as to temporarily disable him beyond October 1, 1948 (R. pp. 87, 91, 92).

The evidence does not show that Lathourakis was unable to swallow solid food. He himself admitted that he could eat hamburgers and fish (R. p. 25). He told Dr. Gray that what he could not swallow was meat (R. 94).

The evidence does not show nor does the record have any evidence of any additional disabilities.

What Lathourakis claimed in his application for adjustment of claim was crushing injury to right arm and severe injury to chest, esophagus and abdomen (R. 9).

ARGUMENT.

COMPETENT EVIDENCE.

Appellees admit that the findings of the Board must be supported by competent evidence (Appellees' Brief p. 4). They seek to maintain that burden by treating incompetent evidence as though it was competent evidence, and by ignoring the competent medical evidence adduced at the hearing.

Lathourakis' testimony that his right arm is numb, pains him when he does a little work, that he has very little grip in his right hand, and that two of his fingers are numb (Appellees' Brief p. 4) relates to subjective symptoms only which are not visible and the cause whereof he was not competent to state. Evidence is not competent of such causation unless adduced by an expert in human anatomy (Appellant's Main Brief pp. 17-19). Actually Lathourakis did not

state that that claimed condition was due to the accident. Nor was he qualified to testify thereto.

PERMANENT PARTIAL DISABILITY.

Dr. McGowan's testimony in respect to Lathourakis' partial permanent disability (Appellees' Brief p. 5) was clearly and distinctly confined to disability that Lathourakis suffered, not from the claimed accidental injury, but from the operation (Appellant's Main Brief pp. 41, 42; R. pp. 52, 80, 81).

The fact, if it be true, that Lathourakis was a high-boat fisherman, had fished for 22 years and had been a strong, powerful man prior to 1948 does not justify the inference that whatever his claimed condition was at the hearing in 1949 was due to the accident. The public press daily instances men, seemingly strong and healthy, suddenly dying or becoming ill from heart or other serious diseases; in other words, Lathourakis' prior outward or apparent good physical condition is not proof of absence of physical conditions impelling or requiring his serious operation, which operation the evidence as stated showed was not required because of the accidental injury.

Dr. Gray did not at any time concede that in his opinion Lathourakis' condition, to correct which the operation was performed, was caused by the accident; in fact, Dr. Gray specifically said: "I came to the opinion that the trauma of the chest had apparently no direct relationship to this injury" (R. 90).

Appellant has no quarrel with the general legal principles announced in the various cases cited by appellees (Appellees' Brief pp. 9 to 12); but, appellant does contend that those decisions have no pertinency in this case and in no wise authorize an award of compensation to an injured employee unless that award is based upon competent evidence proving that the employee is entitled to compensation under the Act.

Appellant appreciates that a medical expert's testimony is not so sanctified as to not be subject to disbelief, if the forum hearing that testimony has reasonable ground to believe from the doctor's attitude or demeanor upon the witness stand that his testimony, whether in opinion or other form, is not true; but, appellant submits that some reasonable ground must appear for such disbelief, and that the record fails to show any reason whatsoever for disbelieving either Dr. Gray or Dr. McGowan.

Furthermore, the rule is, appellant believes, as appears in *Stralovich v. Sunshine Mining Co.*, 201 Pac. (2d) 106, 112, which quotes from *Wallace v. Hogue, et al.*, 185 Pac. (2d) 711, that greater weight will be given to the testimony of a doctor who testifies from personal knowledge of his patient's condition than to medical hypothetical testimony of that patient's condition. The testimony of Dr. Gray and Dr. McGowan is based upon personal examinations of Lathourakis made in an attempt to cure his physical ailments.

The letters of Dr. Williams and Dr. Slyfield are not only unverified, but they very apparently were based

upon examinations made, not to cure Lathourakis, but to obtain information to help him support his claim (Appellant's Main Brief pp. 20 to 21).

If appellees' theory should be adopted, then the Industrial Board could disregard all evidence adduced before it, regardless of any basis for discrediting that evidence, and base its finding entirely upon its own individual prejudices or knowledge.

ADMISSION OF PHYSICIANS' REPORTS.

Appellees seemingly (Appellees' Brief pp. 13 to 14) actually hope to sustain the trial Court's judgment upon the *ex parte*, unverified statements contained in the letters of Dr. Williams and Dr. Slyfield, notwithstanding, as stated, appellees admit that the Board's finding must be based upon competent evidence (Appellees' Brief p. 4). Appellant so thoroughly discussed the inadmissibility of Dr. Williams and Dr. Slyfield's letters in its main brief (Award must be based upon competent evidence; Appellant's Main Brief pp. 14 to 36) and the incompetency thereof as well as of the testimony of Lathourakis and Sheils to prove that Lathourakis' condition or the extent or duration thereof was caused by his claimed injury, that no necessity exists for reiteration herein. Appellant also thoroughly discussed the proposition that the competent evidence adduced at the hearing proved that Lathourakis suffered no permanent disability from his injury (Appellant's Main Brief pp. 36 to 48).

But, appellees seemingly also argue (Appellees' Brief p. 8) that the Board might legally base its findings upon nothing more than Lathourakis' appearance and demeanor upon the witness stand when giving his evidence before the Board.

Appellant concedes that any forum may take into consideration the appearance and demeanor of a witness appearing before it in determining the weight and credibility to be given to that witness' testimony; but, appellant submits that, as so admitted by the appellees as hereinbefore stated, the findings of the Board must be based upon competent evidence, and the Board has no authority to make any finding except upon competent evidence regardless of what personal knowledge the Board may have of local conditions in Alaska.

Appellant contends that the reports and letters of Drs. Williams and Slyfield were not admissible in evidence for any purpose whatsoever (Appellant's Main Brief pp. 19 to 36) and that the provision of the Act that "the Industrial Board may make rules not inconsistent with this act for carrying out the provisions hereof", Section 43-3-14 A.C.L.A. 1941 (Appendix "A" p. 29; Appellant's Main Brief pp. 7-36) does not authorize the Board by rule or otherwise to base a finding upon other than competent evidence.

Appellant submits that the law nowhere authorizes the admission of incompetent evidence at a hearing upon a contested claim before the Board or the basing of a finding upon hearsay or *ex parte* evidence.

The Washington Supreme Court has specifically overruled its two decisions (Appellees' Brief p. 9) in *Devlin v. Department of Labor*, 78 P. (2d) 952, and *McKinnie v. Department of Labor*, 37 P. (2d) 218, in its subsequent decision in *Hutchings v. Department of Labor*, 167 P. (2d) 444, 449, 450, and by a long line of cases has sustained the principle for which appellant contends in this case, namely: that even in a workman's compensation case a finding of the Board must be based upon competent evidence.

In *Sweitzer v. Department of Labor*, 34 P. (2d) 350, that Court upon rehearing, reversed its previous decision in 30 P. (2d) 980 and held that the report of a doctor who was not sworn as a witness was erroneously admitted in evidence; hence, that the decision of the joint board and the finding of the Superior Court were not entitled to a presumption of correctness.

That principle was sustained by that Court in—

Brown v. Department of Labor, 161 P. (2d) 533,
534.

That doctrine was again reaffirmed in *Hutchings v. Department of Labor*, supra, wherein, as stated, not only were the previous *McKinnie* and *Devlin* cases overruled, but the Court also held that no part of the *ex parte* record, simply because the statute required it to be certified up to the Court, was admissible except subject to rules of evidence applicable to civil cases and that a letter written by the alleged injured employee to a physician was neither competent nor relevant.

The Washington Supreme Court has reaffirmed this rule in such late cases as—

Karlson v. Department of Labor, 173 P. (2d) 1001, 1012;

Olympia Brewing Co. v. Department of Labor, 208 P. (2d) 1181, 1185;

Lindsey v. Department of Labor, 213 P. (2d) 316, 317.

Appellant is not unmindful of the rule laid down by this Court in *Contractors et al. v. Pillsbury*, 150 F. (2d) 310, 312 (Appellees' Brief p. 18); but, appellant urges that this Court neither in that nor any case has ever held other than that a finding must be based upon competent evidence.

Nor did the United States Supreme Court hold to the contrary in its two decisions cited by Mr. Circuit Judge Bone in the *Contractors* case. Mr. Justice Hughes specifically said: "We think there was evidence to support the finding of the Deputy Commissioner" in

South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 261, 84 L. Ed. 732, 737, 738.

It is also clear that the United States Supreme Court holds that the inference leading to any finding must be based upon evidence. See:

Norton v. Warner Co., 321 U.S. 565, 568, 88 L. Ed. 931, 935.

Appellant challenges appellees' contention (Appellees' Brief p. 18) that hearsay or any other incompetent evidence is admissible for the purpose of

being given such weight as the forum by whom a contested claim is heard may deem it entitled to, or that any such principle is supported by either

Lallier Construction Co. v. Industrial Commission, 17 P. (2d) 534,

or

Employers etc. v. Industrial A. C., 151 Pac. 423,

or by any other decision cited by appellant (Appellant's Main Brief pp. 30 to 37) except in such cases and for such specific purposes as some state statutes authorize, which is not true of the Alaska statute (Appendix "A", pp. 1-52, Appellant's Main Brief).

ALASKA WORKMEN'S COMPENSATION ACT DOES NOT AUTHORIZE RECOVERY OF BOTH TEMPORARY DISABILITY COMPENSATION AND PERMANENT, EITHER PARTIAL OR TOTAL, DISABILITY COMPENSATION AS A RESULT OF ONE AND THE SAME INJURY.

Appellees' opposition to this contention is based entirely upon the trial Court's statement in its opinion that appellant's analysis of the Alaska Workmen's Compensation Act, while plausible, appeared to rest largely upon conjecture and speculation as to legislative intent (Opinion, R. p. 122; Appellees' Brief pp. 19-20).

Appellant thoroughly analyzed the Act to establish that that law clearly permits none other than this construction as contended by appellant (Appellant's Main Brief pp. 48 to 68); hence, appellant believes no necessity exists to further elaborate on that analysis.

With all due respect to the learning and ability of the lower trial judge, appellant challenges his conclusion that appellant's analysis is based upon conjecture or speculation. Appellant urges that nothing in that law (Appellant's Main Brief, Full Text, Appendix "A" pp. 1 to 52) can be found to sustain the contention that both total temporary disability compensation and permanent, either partial or total, disability compensation can be awarded for one and the same injury, or that sub-section 43-3-1 thereof (Appendix "A" pp. 10, 11, Appellant's Main Brief) can be read other than as contended by appellant (Appellant's Main Brief pp. 51 to 55); hence, that the trial Court was incorrect in stating that the language of the Act was not subject to appellant's construction of it.

RECOVERY OF ATTORNEYS' FEES ON APPEAL.

Appellant has discussed this question in its main brief (pp. 68 to 73) and believes no necessity exists to reiterate its argument other than to point out that the appellees clearly fail (Appellees' Brief pp. 20-21) to give any heed to the fact that attorneys' fees allowable as costs under Section 55-11-55, A.C.L.A. 1949, are specifically limited to the classes of cases set out in Section 55-11-51, A.C.L.A. 1949 (Appellant's Main Brief p. 73), whereas workmen's compensation claims are not within any of those classes.

CONCLUSION.

Appellant again urges that the judgment of the District Court and the decision and award of the Alaska Industrial Board should be reversed and modified to holding that appellee Lathourakis' total temporary disability ended on October 1, 1948, for which he was entitled to be paid total temporary disability compensation of \$1050.80 only, which was paid him prior to his making and filing his claim herein (R. 10), and that he sustained no permanent either partial or total disability whatsoever and is not entitled to be paid any permanent either partial or total disability compensation; and, that the judgment of the District Court should be reversed in the allowing appellee Lathourakis an attorney fee of \$350.00, or any sum, as an allowable cost for the services of his attorney in the proceedings on appeal before the District Court.

Dated, October 9, 1950.

Respectfully submitted,

R. E. ROBERTSON,

ROBERT W. HOLLAND,

BOGLE, BOGLE & GATES,

Attorneys for Appellant.

No. 12,562

United States Court of Appeals
For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation),

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, Composed
of the Territorial Insurance Commissioner,
Attorney General of Alaska
and the Territorial Commissioner of
Labor and PETER LATHOURAKIS,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

R. E. ROBERTSON,

Seward Building, Juneau, Alaska,

ROBERT V. HOLLAND,

BOGLE, BOGLE & GATES,

Central Building, Seattle 4, Washington,

Attorneys for Appellant.

FILED

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U.S. DISTRICT COURT
CLERK

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No. 12,562

United States Court of Appeals For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation),

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, Composed
of the Territorial Insurance Commissioner,
Attorney General of Alaska
and the Territorial Commissioner of
Labor and PETER LATHOURAKIS,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant asks for a rehearing because it believes the Court in its opinion of August 10, 1951, notwithstanding its serious consideration for nearly 8 months of the points upon which appellant urges it is entitled to a reversal, overlooked competent, relevant evidence and either overlooked or disregarded applicable principles of law sustaining appellant's appeal.

POINT I.

UNDER THE WORKMEN'S COMPENSATION ACT OF ALASKA THE ALASKA INDUSTRIAL BOARD'S FINDINGS, DECISION AND AWARD MUST BE BASED UPON COMPETENT EVIDENCE, AND NOT UPON EX PARTE, HEARSAY, UNVERIFIED, OR OTHER INCOMPETENT EVIDENCE, WHEREAS THE BOARD'S DECISION AND AWARD AND ITS FINDINGS HEREIN WERE BASED UPON EX PARTE, HEARSAY, UNVERIFIED, OR OTHER INCOMPETENT EVIDENCE AND THEREFORE WERE NOT CONCLUSIVE UPON THE DISTRICT COURT.

Appellant did not, certainly did not intend to, qualify this point to any admission that it made no charge other than that the Board's award and the District Court's decision, as intimated by the Court's opinion, p. 2, were based in part on hearsay evidence in the form of letters from the employee's physicians.

Appellant stands squarely upon the proposition that the award and the decision were based entirely upon *ex parte*, hearsay, unverified, and other incompetent evidence, and ignored the only competent evidence by Doctors McGowan and Gray.

Appellant tried to put that contention thoroughly before the Court in its main brief (pp. 14-48).

Appellant does not deny Lathourakis testified as quoted by the Court (Op. p. 2). Nor does appellant deny that a numb hand is an objective symptom. Appellant questions that swallowing medicine, though it may be an objective act, is an objective, subjective, or other symptom of any kind.

What appellant contends is that, though Lathourakis could testify he vomited, his hand was numb, he

swallowed medicine, he was not qualified to testify what caused him to vomit, what numbed his hand, for the cure of what condition he swallowed medicine, namely: he was not an expert in human anatomy, so was not qualified to so testify and all of his testimony as to the character, extent and future effect, if any, of the internal injuries he claims to have suffered was incompetent.

Nor can appellant concede that Lathourakis' testimony was corroborated in any manner by Dr. Gray. As appellant reads the depositions of both Doctors McGowan and Gray, each specifically denied (1) Lathourakis' condition was due to any injuries he received in the accident; (2) his operation was due to the injuries he received in the accident.

To the contrary, they testified his condition was due to the operation. (McGowan's deposition, R. 52, 56-58; 51; 70; 79-80; 81; Gray's deposition, R. 86-91; 91-92; 103).

Dr. Gray said:

Q. Doctor, did you at any time form any conclusions to the difficulty which this man was encountering with his esophagus.

A. Originally I felt that a reasonable diagnosis was carcinoma of the esophagus, and therefore it was unrelated to any injury, and that is why I recommended immediate medical care, but I had to advise that the condition was unrelated to the injury, and suggested to the man that he would have to seek care of his own.

At a later date I had an opportunity to review the findings that were made.

Q. Did you form any conclusion from your own examination of the man and from your review of any findings made?

A. Yes. After reviewing all of the findings in this case and reading the opinions of a pathologist who examined him, and surgeon who treated him, I came to the conclusion that this man had a pre-existing condition in his esophagus of a congenital nature, whereby he had stomach glands present in the esophagus. These stomach glands produced acid, which the linings of the esophagus is not prepared to handle, and this is an accepted cause of inflammation of the esophagus.

I came to the opinion that the trauma of the chest had apparently no direct relationship to this injury.

This opinion is not based on any great experience that I had with diseases of the esophagus. It is based upon two facts. In the first place I cannot conceive how a trauma to the chest can affect the esophagus without severely injuring or breaking down the chest wall, or causing obvious internal injuries.

Seemingly the Court ignored the Slyfield and Williams letters; but, appellant submits throughout its main brief it maintained that Lathourakis' evidence was incompetent (Bf. 17-26), and that appellant had been denied its right of cross-examination, and that the award could not be legally based upon hearsay and incompetent evidence (Bf. 27-36).

The governing rule was announced by the United States Supreme Court, viz.:

But the more liberal the practice in admitting testimony, the more imperative the obligation to pre-

serve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

Interstate Commerce Com. v. Louisville & N.R. Co., 227 US 88, 93, 57 L.ed. 431, 434,

which rule was reaffirmed in

Bridges v. Wixon, 326 US 135, 89 L.ed. 2103.

This rule applies in Alaska, whose legislature has no authority to deprive appellant of due process of law or of the equal protection of the laws, which deprivation necessarily results by violation of the rule.

The Board has no authority to violate this rule announced by the U. S. Supreme Court, and the Board's rule 13, in admitting hearsay or other incompetent evidence, necessarily is illegal.

Alaska's legislature is a legislative, not an administrative, body; hence, necessarily the Federal Administrative Procedure Act doesn't apply to it; but, such fact is entirely immaterial, because the legislature's acts are subject to the Constitution of the United States.

Rules, such as the Board's Rule 13, and the administration of them as the Board did in its award in

this and the companion *Landro* case, undoubtedly lead to the enactment of the Administrative Procedure Act in Congress' attempt to prevent Federal administrative bodies, similar to the Alaska Industrial Board, from depriving persons of their constitutional rights.

Appellant is cognizant of the theoretical rule advocated by Wigmore. But, fortunately, even as admitted by Wigmore (Volume 1, p. 83, 3rd ed.), the majority of the courts refuse to recognize a theory that, if practiced, would deprive litigants of the American principles of justice by which their constitutional rights are protected against the threat of hearsay, with its lack of cross-examination to establish the truth and to destroy rumor, gossip, and falsehood.

It is of grave moment if the Court lays down or even intimates that in its circuit a litigant cannot claim and rely upon the right of cross-examination; but, seemingly if this Court in either this or the companion *Landro* case, upholds its present opinion, at least by implication it thereby announces that that right does not exist in hearings before the Alaska Industrial Board.

Appellant predicts that such announcement would eventually lead to rumors, newspaper articles, and unsworn hearsay of all kinds becoming admissible even in the courts.

Appellant is unable to see any evidence, other than the *ex parte*, unverified Slyfield and Williams letters, that Lathourakis' condition became fixed on May 20, 1949.

Appellant urges that the only injury proved by competent evidence was the temporary discoloration, swelling, and bruising of Lathourakis' left forearm, and that he entirely recovered from that injury by October 1, 1948, and was paid in full all the compensation he was entitled to therefor.

POINT II.

THE WORKMEN'S COMPENSATION ACT OF ALASKA DOES NOT AUTHORIZE OR PROVIDE FOR THE AWARD FOR THE SAME INJURY TO THE SAME EMPLOYEE NOT ONLY OF TEMPORARY, EITHER PARTIAL OR TOTAL, DISABILITY COMPENSATION BUT ALSO OF PERMANENT, EITHER PARTIAL OR TOTAL, DISABILITY COMPENSATION ARISING BY ACCIDENT OUT OF AND IN THE COURSE OF HIS EMPLOYMENT, WHEREAS THE DISTRICT COURT'S JUDGMENT AS WELL AS THE ALASKA INDUSTRIAL BOARD'S DECISION AND AWARD ALLOWED LATHOURAKIS, WHO SUSTAINED ONLY ONE INJURY IN THE SAME ACCIDENT, TOTAL TEMPORARY DISABILITY COMPENSATION UP TO MAY 20, 1949, AMOUNTING UNDER THE JUDGMENT TO \$2,005.00, AND 50% PERMANENT DISABILITY COMPENSATION OF \$3,600.00.

Appellant's contention is broader than "that the act does not permit recovery for both temporary and permanent disability," but includes the condition "arising out of the same injury in the same accident."

Appellant tried to thoroughly analyze the statute in its main brief. (Bf. 48-67).

Appellant submits the Court has overlooked the important, new, legislative language in present Section 1 of the Act (Bf. 52) and the important legislative language removed from Section 1 of the former 1915, 1923, 1927, and 1929 Acts (Bf. p. 52).

Language inserted: “or due him” and “in addition to.”

Language removed: “and the employee has been paid compensation for temporary disability” and “deducted from.”

To mean, what the Court holds, all the legislature need have done was to substitute “in addition to” for “deducted from,” because the Section would then have read:

“And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, and the employee has been paid compensation for temporary disability, the amount so paid him shall be in addition to the amount to which he shall be entitled under such provisions in this schedule.”

Liberality of construction does not justify the conclusion that the legislature intended to provide by the 1946 act that compensation paid for temporary disability should be retained by the employee even though he later became entitled to compensation for, example, the loss of an arm.

If so, the legislature acted senselessly in its elimination of the clause, “and the employee has been paid compensation for temporary disability.”

Nor is appellant’s a harsh construction. No person can lose a hand, a foot, an arm, or a leg without suffering some temporary disability. Under the Court’s

construction, in every instance he will be entitled to be paid temporary disability compensation plus the fixed compensation for the lost member. Appellant submits that there is only one injury, the lost member.

Appellant has never contended that under the Act should an employee be paid disability compensation, either temporary or permanent, but later die because of the same injury that his beneficiary would not be entitled to the compensation allowed for his death. Then two different claimants are involved, each entitled to their compensation, and payment of one could not be credited against the other.

Appellant is unable to see, even though Workmen's Compensation Acts are to be liberally construed, the applicability of *B. & P. Steamboat Co. v. Norton*, 284 U.S. 408, 414, or how Title 33 USCA 908, in view of its language could have been construed otherwise than it was by the U. S. Supreme Court.

But, the language of that Statute is not the language of the Alaska Act, nor is there any similarity.

Nor will any harsh or incongruous result occur by upholding appellant's contention. Nothing will result other than to make effective the plain intent of the legislature as expressed in Section 1 of the Act. Lathourakis will be paid all the compensation he is entitled to under the Act.

Furthermore, the Congress seemingly thought the construction was strict, not liberal. See: U.S. Code Congressional Service, 80th Congress, Second Session, 1948, Volume 2, page 2.

Moreover, the Longshoremen's Act now and then had specific limitations on amounts of compensation payable. See: Title 33 USCA 914(m).

In *Contractors v. Pillsbury*, 150 F. 2d 310, seemingly the question of the competency of the evidence was not involved. This Court specifically said (ib., 312): "There was evidence covering material facts before the Deputy Commissioner which will support the award."

Appellant submits there was no competent, material evidence to support the Board's award here.

The Court also upheld the now familiar rule of liberal construction of Workmen's Compensation Laws.

Thoresen v. Schmahl, 24 NW 2d 237, and *Wilkins v. Blanchard-McDonald Lumber Co.*, 52 A. 2d 781, each reiterate that rule.

Appellant doesn't challenge that rule or its propriety; but, contends it doesn't override plain legislative language or recognized rules of statutory construction.

If the Court's present opinion stands, the serious result will follow that no limitation whatever exists in Alaska upon the payment of temporary disability compensation, and no matter how much is paid or for how long a period, should eventually the injury become permanent, either total or partial, compensation must be paid therefor in addition to that already paid for temporary disability compensation.

POINT III.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ALLOW AND ASSESS AN ATTORNEY'S FEE OF \$350.00, OR ANY SUM, TO LATHOURAKIS FOR SERVICES OF HIS ATTORNEY IN THE PROCEEDINGS BEFORE THAT COURT.

Appellant submits that this Court's opinion disregards the fact that when Section 43-3-17, ACL 1949, reading:

“In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.”

was enacted on April 1, 1946 (Ch. 9, ASL 1946,—Appendix A, Appellant's Brief), attorney's fees were not allowed as costs in ordinary civil actions under Chapter 58, ASL 1937, which was then in effect.

Chapter 84, ASL 1947, now Section 55-11-55, ACLA 1949, was not enacted until March 27, 1947.

But, the allowance of costs under Section 55-11-55 is controlled by Section 55-11-52, ACLA 1949, and this proceedings is not within the purview of the latter section.

Appellant submits that it is unthinkable the Territorial Legislature, without plain words, would enact a law requiring an injured employee to pay his employer's attorney fee should an appeal from the Board's award to the District Court result favorably to the employer, yet surely, if an unsuccessful employer may be forced to pay it, so in justice and fair play should the employee, if he loses in the District Court.

Wherefore appellant prays that it may be granted a rehearing, but should it be denied that a further stay of 30 days may be granted.

Dated, Juneau, Alaska,
September 7, 1951.

Respectfully,

R. E. ROBERTSON,

ROBERT V. HOLLAND,

BOGLE, BOGLE & GATES,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay; and that all three points are meritorious, and the first two are of grave import to the welfare of Alaska and to the administration of justice therein.

Dated, Juneau, Alaska,
September 7, 1951.

R. E. ROBERTSON,
Of Attorneys for Appellant.

No. 12563

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

MOULTON & POWELL and J. K. CHEADLE,
Appellees.

MOULTON & POWELL and J. K. CHEADLE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

FILED

Appeal from the United States District Court
Eastern District of Washington
Southern Division

OCT 30 1950

PAUL R. O'BRIEN

No. 12563

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

MOULTON & POWELL and J. K. CHEADLE,
Appellees.

MOULTON & POWELL and J. K. CHEADLE,
Appellants,
vs.

UNITED STATES OF AMERICA,
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Transcript of Record

Appeal from the United States District Court
Eastern District of Washington
Southern Division

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ATTORNEYS OF RECORD

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J. K. CHEADLE,

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Attorneys for Defendant and Appellee.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

No. 128-99

UNITED STATES OF AMERICA,

Petitioner,

vs.

CLEMENTS P. ALBERTS, et al., and PRIEST
RAPIDS IRRIGATION DISTRICT, a Mu-
nicipal Corporation of the State of Washington,

Defendants.

PETITION FOR PAYMENT OF
ATTORNEYS' FEE

Come now Moulton & Powell and J. K. Cheadle,
attorneys for the Priest Rapids Irrigation District
in the above-entitled cause, and show and petition to
this Court as follows:

I.

Petitioners were employed by the Priest Rapids
Irrigation District to represent said district as its
attorneys in the above-entitled cause, by contract
dated August 30, 1946, a copy of which contract is
attached hereto as Exhibit "A" and is herein incor-
porated by reference.

II.

Petitioners have performed said contract by representing said district in said cause in this Court and in the Court of Appeals for the Ninth Circuit; and the disposition of said cause by the Court of Appeals has become final.

III.

In accordance with the disposition of said cause upon appeal, a modified judgment against the Government in the sum of \$302,856, together with interest, has been entered in this Court in said cause.

IV.

The amount of the attorneys' fee, together with interest, due and payable to petitioners in accordance with said contract, has been determined by petitioners and the officers of said district to be the sum of \$78,918.85. Said determination, and the approval of said district of said determination, and the consent of said district to the payment herein petitioned for, are set forth in a resolution of the board of directors of said district, a copy of which resolution is attached hereto as Exhibit "B" and is herein incorporated by reference.

Wherefore, petitioners pray that this Court enter an order directing the Clerk of this Court to pay to Moulton & Powell and J. K. Cheadle the sum of \$78,918.85 from the sum paid or to be paid into the

registry of this Court in the above-entitled cause,
Docket 128-99.

Dated this 19th day of November, 1949.

MOULTON & POWELL,

By /s/ CHARLES L. POWELL,

/s/ J. K. CHEADLE,

Petitioners.

Copy of the above petition received this 21st day
of November, 1949.

/s/ BERNARD H. RAMSEY,

Special Assistant to the

Attorney General.

Exhibit "A"

This Agreement made and entered into this
day of, 1946, by and between Priest
Rapids Irrigation District, hereinafter designated
"District," and Moulton & Powell and J. K. Cheadle,
hereinafter designated "Attorneys," Witnesseth:

Whereas, an action is now pending in the United
States District Court for the Eastern District of
Washington, Southern Division, involving condem-
nation of property of the District, and Moulton &
Powell have been heretofore employed to protect the
interests of the District, and certain payments have
been made to them under said contract; and whereas
it has developed that said litigation is much more
involved and the likelihood of appeal is much
greater than initially contemplated;

Now, Therefore, it is hereby mutually understood
and agreed that the District does hereby employ the

Attorneys to represent it in the above-described action and that the Attorneys will give their best efforts and all time necessary to the proper preparation and presentation of the case in behalf of the District.

The Attorneys acknowledge and accept the sums heretofore paid to them in cash in the sum of \$..... as the only retainer or certain fee. In addition to said cash retainer or certain fee, the District will pay to the Attorneys a contingent fee based upon percentages of the amounts by which the condemnation award exceeds \$169,850.00 (the amount of the District's bonded indebtedness paid with money deposited by the Government in court in said condemnation case). Said percentages shall be as follows:

| | | |
|------------------------------|--------------|---------------------------|
| 30% of the first | \$100,000.00 | |
| | | in excess of \$169,850.00 |
| 20% of the second | \$100,000.00 | |
| | | in excess of \$169,850.00 |
| 10% of the third | \$100,000.00 | |
| | | in excess of \$169,850.00 |
| 5% of all additional amounts | | |
| | | in excess of \$169,850.00 |

It is understood and agreed that in the event the condemnation award does not exceed \$169,850.00, then no fee in addition to said cash retainer or certain fee will be paid to the Attorneys.

The District agrees to pay all of the costs necessary in the proper presentation of said case for trial

and on all appeals and will furnish all necessary information to the Attorneys on request.

The Attorneys agree that, before any computation of the additional, contingent fee shall be made, there shall first be deducted from the award and reimbursed to the District the amount paid by the District as costs. The Attorneys also agree that they will allow as a credit upon any additional, contingent fee to be paid to the Attorneys the sum of \$..... heretofore paid as the cash retainer or certain fee.

This agreement shall not be binding upon the directors of the District personally in any manner, in the event the Court should hold that they as directors are not authorized to make it.

This contract shall supersede the contract heretofore made between the District and Moulton & Powell.

Dated this 30th day of August, 1946.

PRIEST RAPIDS

IRRIGATION DISTRICT,

By /s/ B. SALVINI,

President.

[Seal] /s/ R. S. REIERSON,

Secretary.

MOULTON & POWELL,

By /s/ CHARLES L. POWELL,

/s/ J. K. CHEADLE.

Exhibit "B"

Resolution of the Board of Directors of the Priest Rapids Irrigation District Regarding Payment of Attorneys' Fee to Moulton & Powell and J. K. Cheadle

Whereas, the Priest Rapids Irrigation District by its Board of Directors entered into a contract with Moulton & Powell and J. K. Cheadle on the 30th day of August, 1946, employing said attorneys to represent said District in the condemnation action of the United States of America v. Alberts, Priest Rapids Irrigation District, et al., No. 128-99, in the United States District Court for the Eastern District of Washington; and

Whereas, said attorneys have performed said contract by representing said District in said cause in said District Court and in the Court of Appeals for the Ninth Circuit; and

Whereas, following disposition of said cause by the Court of Appeals neither party petitioned for review by the Supreme Court of the United States; and the disposition of said cause by the Court of Appeals thus became final; and

Whereas, in accordance with said contract with said attorneys, it has been determined by the Board of Directors of said District that the expenses incurred by said District as expenses and costs in the defense of said action amount to \$6,805, that said sum deducted from the condemnation award of \$302,856 leaves a balance of \$296,051.00 as the basis for computation of the fee in accordance with said

contract; and that said fee thus computed, less the credit of \$2,000.00 allowed for the cash retainer or certain fee heretofore paid, together with interest at the rate of 6% per annum allowed in the condemnation judgment and computed for the purposes of said contract from October 1, 1943, to December 1, 1949, amounts to \$78,918.85.

Now, Therefore, Be It Resolved that said determination and said computation of said fee due and payable said attorneys under said contract in the sum of \$78,918.85 be and hereby is approved and that consent of said District be and hereby is given to payment of said sum of \$78,918.85 to said attorneys by the Clerk of said District Court from the sum paid or to be paid into the registry of said Court in said cause, Docket No. 128-99.

Passed by the Board of Directors of the Priest Rapids Irrigation District this 19th day of November, 1949.

/s/ B. SALVINI,
President and Director.

/s/ J. H. EVETT,
Director.

Attest:

[Seal]: /s/ R. S. REIERSON,
Secretary.

[Endorsed]: Filed November 21, 1949.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

No. 128-99

UNITED STATES OF AMERICA,

Petitioner,

vs.

CLEMENTS P. ALBERTS, et al., and PRIEST
RAPIDS IRRIGATION DISTRICT, a Mu-
nicipal Corporation of the State of Washington,
Defendants.

MODIFIED JUDGMENT

The above-entitled action having come on for trial before the undersigned Judge of the above-entitled Court on February 10, 1947, the petitioner, United States of America, being represented by Bernard H. Ramsey, Special Assistant to the Attorney General, and June Fowles, Special Attorney, Department of Justice, and the defendant, Priest Rapids Irrigation District, appearing by Charles L. Powell and J. K. Cheadle, its attorneys, and no other parties appearing in the trial of said action, and a jury having been duly impaneled and sworn to determine the just compensation to be paid for the taking of the property, condemned, and having under order of the Court viewed the property, witnesses having been sworn, and testimony having been taken, and the jury having been instructed to return its general verdict determining the value of the power properties of the Priest Rapids Irriga-

tion District, less the portion of the value thereof which the jury found was required for irrigation purposes, and pursuant to said instruction the jury having returned its general verdict in the sum of \$473,356.00 as being the value so determined as of October 1, 1943, and the Court having instructed the jury to answer a special interrogatory determining the value of the irrigation properties, including that portion of the value of the power properties found to be required for irrigation purposes, and the jury having returned an answer to said special interrogatory determining the value of said irrigation properties to be \$365,845.00 as of April 1, 1943, and

It further appearing to the Court that there has been deposited in the registry of the above-entitled Court the amount of estimated just compensation for the taking of the property hereinafter described, the sum of \$170,500.00, which said sum was deposited on May 12, 1944, and

The Court being duly and fully advised in the law and in the premises, and having before it the mandate of the United States Court of Appeals for the Ninth Circuit, received by this Court upon disposition of the above-entitled action on appeal,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the verdict of the jury finding and determining the just compensation in the sum above set forth for the power properties of the Priest Rapids Irrigation District be and the same is hereby confirmed and approved;

It Is Further Ordered, Adjudged and Decreed that the total amount of compensation, including the full and fair market value of the power properties, less that portion of the value thereof devoted to irrigation, as of the date of taking, to wit: October 1, 1943, and the full sum of all damages resulting to the persons and parties interested therein by reason of the taking and appropriation by the United States of America of the hereinafter described interests of said properties, and just compensation for the taking thereof is the sum of \$473,356.00, being the sum fixed by the verdict of the jury as hereinabove set forth for the condemned interest in said power properties; and

It Is Further Ordered, Adjudged and Decreed that the value of the irrigation properties of the Priest Rapids Irrigation District, as of April 1, 1943, was the sum of \$365.845.00, and that there shall be no compensation paid to the Priest Rapids Irrigation District for the taking of said irrigation properties; and

It Is Further Ordered, Adjudged and Decreed that there be and hereby is vested in the United States of America, petitioner herein, the full fee simple title in and to the following-described properties.

Subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, and also subject to all easements and rights of whatever nature, owned by the Washington Irrigation and Development Company in and as to the lands hereinafter described as Par-

cel PR-1; and to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines in and as to the lands hereinafter described as Parcel PR-3; To Wit:

Parcel PR-1—Tract No. W-2004

Parcel A:

Beginning at a point on the East line of Section three (3), Township thirteen (13) North, Range twenty-three (23) East, W.M., 36 feet North of the quarter section corner on said East line; thence North 56 degrees West a distance of 2070 feet; thence North 52 degrees 30 minutes West 2386 feet, more or less, to a point on the North boundary line of said Section 3, which point is $986\frac{1}{2}$ feet West of the quarter section corner on the North boundary of said section; thence East along said North boundary line of said section to the West Bank of the Columbia River; thence in a Southeast direction along said West Bank of the Columbia River to the East line of Section 3; thence South along the East line of said Section 3 to the point of beginning.

Parcel B:

Lots three (3), four (4), seven (7) and eight (8), and second class shorelands of the Columbia River abutting thereon and the Northwest quarter of the Southwest quarter of Section 2, Township thirteen (13) North, Range twenty-three (23) East, W.M.

Parcel C:

Lots two (2), three (3) and four (4), Section eleven (11), Township thirteen (13) North, Range twenty-three (23) East, W.M., except a right of

way 100 feet in width conveyed to Chicago, Milwaukee and St. Paul Railway Company to which Chicago, Milwaukee, St. Paul and Pacific Railway Company is successor, by deed recorded in volume 136 of Deeds, page 418, under Auditor's file No. 41775, records of Yakima County, Washington.

Parcel D:

Lots three (3) and four (4), second class shorelands adjoining and the Southwest quarter of the Southwest quarter of Section thirty-four (34), Township fourteen (14) North, Range twenty-three (23) East W.M., less right of way 100 feet in width conveyed to Chicago, Milwaukee and St. Paul Railway Company to which Chicago, Milwaukee, St. Paul and Pacific Railway Company is successor, by deed recorded in volume 136 of Deeds, page 418, under Auditor's File No. 41775, records of Yakima County, Washington.

and also:

Together with all rights of the Priest Rapids Irrigation District, a Washington corporation, to construct and maintain wing dams for power canal for water plant in Columbia River at Priest Rapids, which is immediately adjacent to the lands above described, and also including the right to divert the water of the Columbia River at Priest Rapids for the purpose of developing power upon the lands above described, and also all of those certain headgates, headworks, wing dams, embankments, concrete power house, wing walls, gates and draft tubes located upon, appurtenant to or used in connection with the above-described lands, together with all water rights appurtenant thereto or used

in connection with the lands heretofore described.
All in Yakima County, Washington.

Parcel PR-2

All presently existing easements and/or rights of the Priest Rapids Irrigation District, a Washington corporation, for the construction, operation, maintenance and patrol of an electric power transmission line running from its power house site located in Parcel PR-1, to its pumping station site located in Parcel PR-3, including all poles, wires and appurtenances. The approximate location of said transmission line is as follows:

That certain 66,000 volt transmission line known as "The Hanford-Priest Rapids Line," including poles, wires, insulators, cross arms, guys, props and hardware, and beginning at the power house located on the land described in Parcel PR-1 in Section 2, Township 13 North, Range 23 East, W.M.; and extending in a Southeasterly direction through Sections 2, 11 and 12, Township 13 North, Range 23 East, W.M., to the Southeast corner of Section 12, Township 13 North, Range 23 East, W.M.; and then in an Easterly direction along the North line of Sections 18, 17, 16, 15, 14 and 13 in Township 13 North, Range 24 East, W.M.; then in an Easterly direction along the North line of Sections 18, 17, 16, 15, 14 and 13 in Township 13 North, Range 25 East, W.M.;

Also that certain branch line known as the: "Coyote Stub Line," beginning at a point on the main 66,000-volt Hanford-Priest Rapids Line at the

Northeast corner of Section 13, Township 13 North, Range 25 East, W.M., and extending in a Northerly direction along the East line of Sections 12 and 1, Township 13 North, Range 26 East, W. M.; to the Coyote Pumping Station formerly owned by the Hanford Irrigation & Power Company, and which is located upon land hereinafter described in Parcel PR-3 as Tract No. G-452. All in Yakima and Benton Counties, Washington.

Parcel PR-3—Tract No. G-452

Government Lot Four (4), Section six (6), Township thirteen (13) North, Range twenty-six (26) East, W.M., together with second class shorelands adjoining, in Benton County, Washington, containing 16.72 acres, more or less.

Parcel PR-4

All water rights and appropriations of water from the Columbia River made or owned by the Priest Rapids Irrigation District, a Washington corporation.

Parcel PR-5

All right, title or interest of the Priest Rapids Irrigation District, a Washington corporation, in and to the following described lands, including all canals, ditches, laterals pipe lines, easements, rights of way and appurtenances owned by said Priest Rapids Irrigation District:

Beginning at the Southwest corner of Government Lot 4 of Section 6, Township 13 North, Range 26

East, W.M.; thence East along South line of Lot 4 to its Southeast corner; thence North along the East line of said Lot 4 to the Southerly right-of-way line of the Priest Rapids Irrigation District canal right-of-way; thence along said canal right-of-way line through Section 6 in said Township and Range; Sections 31, 32, 33, 34, 27, 26, 25, and 36 in Township 14 North, Range 26 East, W.M.; Section 1, Township 13 North, Range 26 East, W.M.; Sections 6, 7, 8, 17, 16, 21, 28, 27, 26, 35, and 36 in Township 13 North, Range 27 East, W.M.; Section 31, Township 13 North, Range 28 East, W.M.; Sections 6 and 5 in Township 12 North, Range 28 East, W.M., to the right bank of the Columbia River, thence Northwesterly, Northerly, Westerly and Southwesterly up the right bank of said Columbia River to the Northwest corner of Government Lot 4 of Section 6, Township 13 North, Range 26 East, W.M., thence South along the West line of said Lot 4 to the point of beginning, together with second class shorelands adjoining Lot 4 in Section 6, Township 13 North, Range 26 East, W.M., in Benton County, Washington.

also:

Beginning at a point on the East line of Section three (3), Township thirteen (13) North, Range twenty-three (23) East, W.M., 36 feet North of the quarter section corner on said East line; thence North 56 degrees West a distance of 2070 feet; thence North 52 degrees 30 minutes West 2386 feet, more or less, to a point on the North boundary line of said Section 3, which point is 986½ feet

West of the quarter section corner of the North boundary of said section; thence East along said North boundary line of said section to the West bank of the Columbia River; thence in a Southeast direction along said West bank of the Columbia River to the East line of Section 3; thence South along the East line of said Section 3 to the point of beginning; and also,

Lots three (3), four (4), seven (7) and eight (8), and second class shorelands of the Columbia River abutting thereon and the Northwest quarter of the Southwest quarter of Section two (2), Township thirteen (13) North, Range twenty-three (23) East, W.M.; and also,

Lots two (2), three (3) and four (4), Section eleven (11), Township thirteen (13) North, Range twenty-three (23) East, W.M., except a right of way 100 feet in width conveyed to Chicago, Milwaukee and St. Paul Railway Company to which Chicago, Milwaukee, St. Paul and Pacific Railway Company is successor, by deed recorded in volume 136 of Deeds, page 418, under Auditor's file No. 41775, records of Yakima County, Washington; and also,

Lots three (3) and four (4), second class shorelands adjoining and the Southwest quarter of the Southwest quarter of Section thirty-four (34), Township fourteen (14) North, Range twenty-three (23) East, W.M., less right of way 100 feet in width conveyed to Chicago, Milwaukee and St. Paul Railway Company to which Chicago, Milwaukee, St. Paul and Pacific Railway Company is successor, by

deed recorded in volume 136 of Deds, Page 418, under Auditor's file No. 41775, records of Yakima County, Washington. All in Yakima County, Washington.

It Is Further Ordered, Adjudged and Decreed that the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation, and that there be and hereby is entered against the petitioner, the United States of America, and in favor of the defendant Priest Rapids Irrigation District, a judgment for the difference between \$473,356.00 and \$170,500.00, which judgment shall bear interest at the rate of 6% per annum on \$473,356.00 from October 1, 1943, until May 12, 1944, and at the rate of 6% per annum on \$302,856.00 from May 12, 1944, until paid, and

It Is Further Ordered, Adjudged and Decreed that said deficiency judgment of \$302,856.00, together with interest as above ordered, and the whole thereof, shall be paid into this Court and remain subject to the orders of this Court until such time as this Court shall order the payment of the balance of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and

It Is Further Ordered, Adjudged and Decreed that title to the hereinabove described interests in the above-described properties be and the same is hereby vested in the United States of America, petitioner

herein, as to the irrigation properties as of April 1, 1943, and as to the power properties as of October 1, 1943, which said title is free and clear of any and all charges, interests, claims, taxes, liens and encumbrances of any kind or character whatsoever.

Done by the Court this 21st day of November, 1949.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ J. K. CHEADLE,

Of Attorneys for Defendant Priest Rapids Irrigation District.

Approved as to Form:

/s/ BERNARD H. RAMSEY,

Special Assistant to the
Attorney General.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

PETITION FOR PAYMENT OF
CERTIFICATES OF INDEBTEDNESS

Comes now Patrick Clarke and respectfully petitions the above-entitled Court and shows:

I.

That petitioner is a resident of Grandview, Yak-

ima County, Washington, and a citizen of the United States of America.

II.

That on or about February 10, 1947, there was entered in the Superior Court of the State of Washington, in and for Benton County, in Wright, et al., v. Chapman, et al., No. 8035, an order authorizing the issuance of certificates of indebtedness by the Directors of Priest Rapids Irrigation District, a copy of which order is attached hereto marked Exhibit "A" and made a part hereof the same as if set forth at length herein.

III.

That pursuant to said order certificates of indebtedness were issued by the Priest Rapids Irrigation District, were signed by the President and Secretary of said District and were by said District delivered to your petitioner.

IV.

That a true and correct copy of one of the certificates of indebtedness issued by said Board and delivered to your petitioner is attached hereto marked Exhibit "B," and made a part hereof, the same as if set forth at length herein, and that eight in all of said certificates were issued and delivered to your petitioner and now are in his possession, and have not been transferred in any manner, and your petitioner has paid, pursuant to said order and pursuant to the delivery of said certificates, to the said Board the total sum of \$6,000.00 in cash.

V.

That during the month of February, 1947, the above-entitled action was tried and resulted in a verdict in favor of the Priest Rapids Irrigation District. That said decision was appealed, and the Court of Appeals for the Ninth Circuit modified the judgment of the United States District Court, Eastern District of Washington, Southern Division, and held that judgment against the Government in the amount of \$302,856 should be entered.

VI.

That pursuant to said certificates of indebtedness and the terms thereof, and in accordance with the aforesaid order of the Superior Court of the State of Washington, in and for Benton County, payment of the certificates of indebtedness, numbered one to eight inclusive, in the sum of \$1,000.00 each, should be ordered from the funds paid into the registry of the above-entitled Court by the petitioner United States of America, and that said payment should be in the sum of \$8,000.00, with interest at the rate of 4% per annum from February 17, 1947, until paid.

VII.

That your petitioner is informed and believes, and therefore alleges the fact to be that said sum of \$6,000.00 paid by petitioner to said district for said certificates was used by said district for the purpose of financing the litigation in behalf of said district in this Court and in the Court of Appeals for the

Ninth Circuit, and that said certificates, together with interest, are a just and proper charge against the condemnation award or judgment in the above-entitled cause.

VIII.

That the Board of Directors of the Priest Rapids Irrigation District has passed a resolution approving and consenting to the payment prayed for herein by your petitioner, a copy of which resolution is attached hereto marked Exhibit "C" and made a part hereof the same as if set forth at length herein.

Wherefore, petitioner prays that an order be entered granting this petition and ordering and directing the Clerk of the United States District Court, for the Eastern District of Washington, Southern Division, to pay to your petitioner from the monies paid or to be paid into the registry of the above-entitled Court the sum of \$8,000.00, with interest thereon at the rate of 4% per annum from February 17, 1947, until paid, said payment to be upon the surrender for cancellation of the eight certificates of indebtedness now held by your petitioner.

/s/ PATRICK CLARKE,
Petitioner.

State of Washington,
County of Yakima—ss.

Patrick Clarke, being first duly sworn, on oath

deposes and says: That he is the petitioner above named, that he has read the above and foregoing petition, knows the contents thereof and believes the same to be true.

/s/ PATRICK CLARKE.

Subscribed and sworn to before me this 19th day of November, 1949.

[Seal]: /s/ CHARLES L. POWELL,
Notary Public in and for the State of Washington,
Residing at Kennewick.

Exhibit "A"

In the Superior Court of the State of Washington
In and for Benton County

No. 8035

C. I. WRIGHT and MAMIE WRIGHT, Husband
and Wife, B. SALVINI, J. H. EVETT, and
PRIEST RAPIDS IRRIGATION DIS-
TRICT, a Municipal Corporation of the State
of Washington,

Plaintiffs,

vs.

HARLEY E. CHAPMAN, County Auditor of Ben-
ton County, Washington, and C. W. NESSLY,
County Treasurer of Benton County, Washing-
ton,

Defendants.

**ORDER AUTHORIZING ISSUANCE OF
CERTIFICATE OF INDEBTEDNESS**

This Matter having come on regularly in its order to be heard on the petition of Priest Rapids Irrigation District for an order requesting direction as to the method of the payment of expenses of said district in the condemnation action described in the petition herein, and said hearing having been held in accordance with due notice given to the defendants in the above-entitled cause and to Bernard H. Ramsey, attorney for the United States of America, and it appearing to the Court from the records and files herein that a decree was entered on or about August 1, 1946, retaining jurisdiction of this cause for appropriate supervision of the administration of said irrigation district, and at the hearing of said petition it having been shown that the Priest Rapids Irrigation District has less than \$1,000.00 cash on hand and that approximately \$7500.00 will be required to meet the necessary expenses of the district, exclusive of attorney fees, in the defense of said condemnation action, and it further appearing to the Court that the issuance and sale of certificates of indebtedness issued by said district is a proper method of financing said condemnation action on behalf of said district, which said certificates of indebtedness shall be paid only from such award as shall be made in the condemnation action, any unused funds to be pro rated back to the purchasers of said certificates, and it further appearing to

the Court from representations made by counsel that a sale of \$8,000.00 in certificates is now possible at a discount of twenty-five per cent, which said sale will yield \$6,000.00 to finance said litigation and that said sale is the best sale obtainable by said attorneys for the district,

Now, Therefore, It Is Hereby Ordered that the directors of Priest Rapids Irrigation District shall execute and deliver certificates of indebtedness for the purposes herein expressed, which shall bear on their face provision that the same shall bear interest at the rate of 4% per annum and shall be a first lien and charge against any award made to the Priest Rapids Irrigation District in the condemnation action for the value of the properties of said district, over and above the amount paid into Court in said condemnation action by the United States of America, and shall be payable only from such award, and not otherwise, and that said certificates of indebtedness shall be issued in the amount of \$8,000.00 and sold at a discount of twenty-five per cent, to yield a net sum of \$6,000.00, to be deposited in the office of the treasurer of Benton County, Washington, to be there disbursed on vouchers approved by the Priest Rapids Irrigation District;

It Is Further Ordered that said certificates shall be of equal rank and priority and shall be payable as herein provided, the funds received therefrom, however, to be subject to withdrawal only for the

payment of the expenses of said district in the defense of said condemnation action, and

It Is Further Ordered that the Court reserves the right to issue additional certificates of indebtedness of equal rank and priority in the event it becomes necessary to finance an appeal from said action, said certificates to be sold only after the amount and rate of discount thereof has been approved by the Court.

It Is Further Ordered that the form of certificate attached hereto be and the same is hereby approved.

Done by the Court this 10th day of February, 1947.

/s/ TIMOTHY A. PAUL,
Judge.

Approved as to Form Only and Notice of Presentation Waived:

/s/ ORRIS L. HAMILTON,
Prosecuting Attorney, Benton
County, Washington.

Exhibit "B"

Certificate of Indebtedness
(Non-Negotiable)

Priest Rapids Irrigation District, a public corporation, acting in accordance with the orders of the Superior Court of the State of Washington in and for Benton County, in Cause No. 8035 (to which orders reference is specifically made) is held and

firmly bound to pay to Patrick Clarke or his assigns, \$1,000.00 lawful money of the United States of America, with interest from date thereof at the rate of four per cent per annum, payable at maturity.

This certificate of indebtedness shall be payable only from an award to be made to the undersigned in that certain action now pending in the United States District Court for the Eastern District of Washington, Southern Division, entitled "United States of America, Petitioner, vs. Priest Rapids Irrigation District, a municipal corporation, et al, defendants," being Cause No. 128-99. In the event no award is made to the undersigned in excess of the bonded indebtedness as heretofore paid by the United States of America, petitioner in said action, or in the event said award cannot be made available for payment of this certificate, no liability may be asserted hereunder.

This certificate is one of a series of eight to be issued by the undersigned for the payment of the expenses of a litigation in the United States District Court for the Eastern District of Washington, Southern Division. In the event an award is made in excess of the bonded indebtedness of the District as shown by the condemnation action and said award is available for payment of this and similar certificates, the same will be paid in full and as a first and prior charge on said funds.

The undersigned will use its best efforts to see that funds are available in said condemnation action for the payment of this and other similar certificates issued. It is understood that all certificates is-

sued to finance said litigation shall be of equal rank and priority.

Dated this 17th day of February, 1947.

PRIEST RAPIDS
IRRIGATION DISTRICT,
A Public Corporation.

By /s/ B. SALVINI,
President.

Attest:

[Seal]: /s/ R. S. REIERSON,
Secretary.

Exhibit "C"

Resolution of the Board of Directors of the Priest Rapids Irrigation District Regarding Payment of Certificates of Indebtedness of Said District Held by Patrick Clarke.

Whereas, the Priest Rapids Irrigation District by its Board of Directors, and pursuant to the authority of a February, 1947, order by the Superior Court of the State of Washington in and for Benton County in C. I. Wright, et al. v. Chapman, et al., No. 8035, on February 17, 1947, did issue eight certificates of indebtedness to Patrick Clarke, each for the amount of \$1000.00 and each bearing interest at the rate of 4% per annum from February 17, 1947, until paid, and did receive from Patrick Clarke \$6000.00 in cash for said certificates of \$8000.00 indebtedness, in accordance with provision for discount contained in said court order; and

Whereas, said \$6000.00 received by the Priest Rapids Irrigation District was used to meet the necessary expenses of said district, exclusive of attorneys' fee, in the defense of the condemnation action, United States of America v. Alberts, Priest Rapids Irrigation District, et al., No. 128-99, in the United States District Court for the Eastern District of Washington; and

Whereas, in said condemnation action, upon appeal, the Court of Appeals for the Ninth Circuit decided that judgment against the Government for \$302,856 should be entered in said District Court.

Now, Therefore, Be It Resolved that the Priest Rapids Irrigation District hereby approves payment of said certificates of indebtedness in the total sum of \$8000.00 together with interest at the rate of 4% per annum from February 17, 1947, until paid, and consents to such payment to Patrick Clarke by the Clerk of said District Court from the sum paid or to be paid into the registry of said Court in said cause, Docket 128-99, provided that such payment be conditional upon delivery to said Clerk by Patrick Clarke of each and all of said eight certificates of indebtedness.

Passed by the Board of Directors of the Priest Rapids Irrigation District this 19th day of November, 1949.

/s/ B. SALVINI,

President and Director.

/s/ J. H. EVETT,

Director.

Attest:

[Seal] /s/ R. S. REIERSON,
Secretary.

Receipt of copy acknowledged.

[Endorsed]: Filed November 21, 1949.

[Title of District Court and Cause.]

ORDER FOR PAYMENT OF
CERTIFICATES OF INDEBTEDNESS

This matter having come on regularly and in its order to be heard upon the petition of Patrick Clarke for the payment of eight certificates of indebtedness in the total amount of \$8000.00, with interest at the rate of 4% per annum from February 17, 1947; and it appearing to the Court from the records and files herein that said certificates of indebtedness were issued by the directors of the Priest Rapids Irrigation District pursuant to an authorizing order of the Superior Court of the State of Washington in and for Benton County, and it further appearing that the directors of the Priest Rapids Irrigation District have by resolution approved, and consented to, the payment prayed for by Patrick Clarke in said petition; and the Court being duly and fully advised in the law and in the premises,

Now, Therefore, It Is Hereby Ordered that upon the delivery of said certificates of indebtedness by

Patrick Clarke and the receipt of said certificates of indebtedness by the Clerk of this Court, the Clerk of this Court is hereby ordered and directed to pay to Patrick Clarke the sum of \$8000.00, together with interest at the rate of 4% per annum from February 17, 1947, until paid, from the sum paid or to be paid into the registry of this Court in Docket 128-99; and

It Is Further Ordered that upon final payment therefor said certificates of indebtedness be and they hereby are ordered cancelled, and the Clerk of this Court is hereby ordered and directed to mark each and every one of said certificates of indebtedness with the word "paid" upon the face thereof by perforation or other plainly legible means, and to inform the secretary of the Priest Rapids Irrigation District and the Clerk of the Superior Court of the State of Washington in and for Benton County of such action, so that their records may be made to conform to such cancellation.

Done by the Court this 6th day of January, 1950.

/s/ SAM M. DRIVER,

Judge.

Approved:

/s/ BERNARD H. RAMSEY,

Of Attorneys for the United
States of America.

Presented by:

/s/ J. K. CHEADLE,

Of Attorneys for Priest
Rapids Irrigation District.

[Endorsed]: Filed January 6, 1950.

[Title of District Court and Cause.]

ORDER FOR PAYMENT OF
ATTORNEY FEES

This matter having come on regularly in its order to be heard upon the petition for the withdrawal of funds by the Priest Rapids Irrigation District for the payment of attorney fees to Moulton & Powell and J. K. Cheadle in the sum of \$78,918.85 from the registry of the above-entitled Court, which petition is supported by a resolution of the Priest Rapids Irrigation District board of directors approving payment of the contract attorney fees in said amount and requesting withdrawal of funds for the payment petitioned for, and it appearing to the Court from the records and files herein and from the evidence introduced that the Court has retained jurisdiction of the fund paid into the registry of the above-entitled Court in the sum of \$422,252.80 in satisfaction of the judgment entered herein, being the modified judgment entered on November 21, 1949, and that the Court has jurisdiction to enter the order for the withdrawal of said funds for the payment of attorney fees, and that the Court at the hearing on January 5 and 6, 1950, received evidence and listened to argument, and on February 27, 1950, received additional evidence, and having considered fully the records and files in this cause, the documentary evidence and oral testimony and the evidence stipulated, and having heard arguments of counsel, and the Court having concluded upon consideration of all rele-

vant matters that the sum of \$55,000.00 is appropriate and reasonable compensation for the services which have been performed by the attorneys for the Priest Rapids Irrigation District on what was necessarily a contingent basis,

Now, therefore, it is hereby ordered that the sum of \$55,000.00 shall be and the same is hereby directed to be withdrawn from the deposit of \$422,252.80 for the benefit of the Priest Rapids Irrigation District, for the payment of attorney fees for the prosecution of this action in behalf of said district, and

It is further ordered that the Clerk of the above-entitled Court be and he is hereby ordered and directed to issue and deliver check in said amount of \$55,000.00 to Moulton & Powell and J. K. Cheadle, Box 125, Kennewick, Washington.

Done by the Court this 10th day of March, 1950.

/s/ SAM M. DRIVER,
District Judge.

Approved as to form:

/s/ BERNARD H. RAMSEY,
Special Assistant to the
Attorney General.

Presented by:

/s/ CHARLES L. POWELL,
Of Attorneys for Priest
Rapids Irrigation District.

[Endorsed]: Filed March 10, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Priest Rapids Irrigation District, and
Moulton & Powell, and J. K. Cheadle, Its
Attorneys of Record:

You and each of you are hereby notified that the petitioner, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order of the Court for payment of attorney fees entered herein on the 10th day of March, 1950, allowing the sum of Fifty-five Thousand and no/100 (\$55,000.00) Dollars as attorney fees to be paid to Moulton & Powell, Attorneys at Law, and J. K. Cheadle, Attorney at Law, from the monies paid into the registry of the District Court of the United States for the Eastern District of Washington in the above-entitled cause.

Dated this 10th day of March, 1950.

UNITED STATES OF
AMERICA,

By /s/ BERNARD H. RAMSEY,
Special Assistant to the Attorney General, of Petitioner's Attorney of Record.

[Endorsed]: Filed March 10, 1950.

[Title of District Court and Cause.]

MOTION FOR STAY

Whereas the above-entitled Court did on the 10th day of March, 1950, make and enter herein an Order for Payment of Attorney Fees in the amount of Fifty-five Thousand and no/100 (\$55,000.00) Dollars from the monies on deposit in the registry of this Court in the above-entitled cause, and

Whereas the United States of America has filed herein its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from said Order, now, therefore,

The petitioner, United States of America, acting by and through Bernard H. Ramsey, Special Assistant to the Attorney General, of its attorneys of record, by authority and at the direction of the Attorney General of the United States, does hereby move the Court for an Order herein staying the distribution and/or payment by the Clerk of this Court to Moulton & Powell and J. K. Cheadle of the sum of Fifty-five Thousand and no/100 (\$55,000.00) Dollars allowed herein by the Court as attorney fees to the said Moulton & Powell and J. K. Cheadle, pending the disposition of said appeal to the United States Court of Appeals for the Ninth Circuit.

Dated this 10th day of March, 1950.

/s/ BERNARD H. RAMSEY,
Special Assistant to the Attorney General, of Petitioner's Attorneys of Record.

[Endorsed]: Filed March 10, 1950. [8]

[Title of District Court and Cause.]

ORDER FOR STAY

This matter coming on upon the motion of the petitioner, United States of America, for an Order herein staying the payment and/or distribution by the clerk of this Court to Moulton & Powell, Attorneys at Law, and J. K. Cheadle, Attorney at Law, of the sum of Fifty-five Thousand and no/100 (\$55,000.00) Dollars out of the monies on deposit in the registry of this Court in this cause as attorney fees herein, pursuant to the Order for Payment of Attorney Fees made and entered herein by the Court on the 10th day of March, 1950; and

It appearing to the Court that the petitioner, United States of America, has heretofore filed herein its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from said Order for Payment of Attorney Fees herein entered on the 10th day of March, 1950, pending the final disposition of said appeal by the United States Court of Appeals for the Ninth Circuit; and

It appearing to the Court that said distribution and/or payment of said sum of Fifty-five Thousand and no/100 (\$55,000.00) Dollars as provided under said Order should be stayed until the final disposition of said appeal,

Now, Therefore,

It is by the Court at this time Considered, Ordered and Adjudged that the payment of said sum of Fifty-five Thousand and no/100 (\$55,000.00) Dollars allowed as attorney fees herein from the monies

now on deposit in the registry of this Court in the above-entitled cause should be and the same is hereby stayed pending the final disposition of the appeal of the United States of America from said Order to the United States Court of Appeals for the Ninth Circuit.

Dated this 10th day of March, 1950.

/s/ SAM M. DRIVER,

Judge of the District Court.

Presented by:

/s/ BERNARD H. RAMSEY,

Special Assistant to

the Attorney General.

[Endorsed]: Filed March 10, 1950.

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that Moulton & Powell and J. K. Cheadle, attorneys for the Priest Rapids Irrigation District and peitioners for payment of attorneys' fees in the above-entitled action, hereby cross-appeal to the United States Court of Appeals for the Ninth Circuit from the order for payment of attorneys' fees entered in the above-entitled action on March 10, 1950.

MOULTON & POWELL and
J. K. CHEADLE,

By /s/ CHARLES L. POWELL,
Cross-Appellants.

[Endorsed]: Filed March 30, 1950.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know all men by these presents: That we, Moulton and Powell and J. K. Cheadle, attorneys for the Priest Rapids Irrigation District, as principals, cash in the amount of two hundred fifty dollars (\$250.00) having been deposited with the Clerk of the Court in lieu of surety, are held and firmly bound unto the above-named petitioner, the United States of America, in the full and just sum of two hundred fifty dollars (\$250.00) to be paid to the said petitioner, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Executed this 30th day of March, 1950.

The condition of this obligation is such that:

Whereas, on the 10th day of March, 1950, in the above-entitled action an order for payment of attorneys' fees was entered, which order provided that the sum of \$55,000.00 be withdrawn from the condemnation award of \$422,252.80 paid into court for the benefit of the Priest Rapids Irrigation District, and that said sum of \$55,000.00 be paid to Moulton & Powell and J. K. Cheadle as attorneys' fee in this condemnation action; and said Moulton & Powell and J. K. Cheadle have cross-appealed to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, if said principals shall pay the costs if said cross-appeal is dismissed or the order appealed from is affirmed, or such costs as the appel-

late court may award if said order is modified, then the above obligation to be void; otherwise in full force and effect.

/s/ MOULTON & POWELL, and
/s/ J. K. CHEADLE,
By /s/ CHARLES L. POWELL.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1950.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT
OF PETITION FOR PAYMENT OF AT-
TORNEYS' FEE

Introduction

The petition of Moulton & Powell and J. K. Cheadle for payment of attorneys' fee was filed on November 21, 1949; and about one month later the Clerk of the Court gave formal notice that the petition was set for argument on January 5, 1950. The Government has not served any objections to the petition, nor any pleading responsive to the petition—although Government counsel informally has indicated that the Government will oppose the payment prayed for in the petition.

On November 21, 1949, the Court stated that the Court would want to have opinion evidence presented at the hearing; and in response, petitioners Moulton & Powell and J. K. Cheadle willingly and without hesitation have prepared to show to the Court at the hearing the reasonableness of the contingent fee.

However, it is submitted that the Government cannot with merit question the fee contract or the payment of the fee to which the district has consented. Reasons and authorities supporting that point follow.—Those same reasons and authorities, and others presented in the following pages, also show to the Court, in response to whatever question the Court of its own motion has raised or may raise, that the fee contract of petitioners with the Priest Rapids Irrigation District is legally proper and is reasonable.

I.

Contingent Fee Contracts, Such as That of Petitioners, Are Valid in This State of Washington, and May Be Made by a Municipal Corporation.

In the State of Washington, as regards the measure and mode of compensation of attorneys, Remington's Revised Statutes, Section 474, provides as follows:

The measure and mode of compensation of attorneys and counselors shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are termed costs.

Section 139-15 of Remington's Revised Statutes provides that: "The code of ethics of The American Bar Association shall be the standard of ethics for the members of the bar of this state." And

Section 11 of Rule 11 For Discipline of Attorneys (193 Wash. 93-a) contains the same provision.

Rules 12 and 13 of the Code of Ethics of the American Bar Association read as follows:

12. Fixing the Amount of the Fee.

In fixing fees, lawyers should avoid charges which over-estimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5)

the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fees.

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a Court as to its reasonableness.

The case law of the Supreme Court of the State of Washington does not indicate that contingent fee contracts in this state are always subjected to the supervision of the court as to their reasonableness—although, of course, whenever a contingent fee contract is questioned in litigation between attorney and client, the contract is subjected to scrutiny by the court. Three significant Washington cases are referred to in the following paragraphs. They show that contingent fee contracts, such as the contract of petitioners, are valid and may be made by a municipal corporation.

In *Hardman v. Brown*, 153 Wash. 85, 279 Pac. 91, the assignee of one of a number of creditors for whom legal work was performed on a 50% contingent fee contract contested payment. The trial court decided against the creditor-client's assignee; and upon appeal the judgment was affirmed. One Levinson had been adjudged a bankrupt; the verified claims presented to the trustee by creditors aggregated about \$125,000.00, while the property turned over to the trustee as assets of the bankrupt was comparatively of insignificant value. It was believed that the bankrupt had hidden assets which could be uncovered and subjected to payment of his debts. However, the trustee had insufficient funds to pay costs of litigation and many of the creditors were willing to undertake the necessary litigation only upon a contingent fee basis.

The litigation was commenced upon an agreement to pay the attorneys one-third of any amounts recovered, but the legal work involved was harder than anticipated; and the fee percentage was revised upward to 50% of the amount recovered (153 Wash. 85, 89).

The creditor-client's assignee who questioned payment of the fee contended that the contract, so far as the particular creditor-client was concerned had been entered into through a misunderstanding of the situation, as regards the identity of the attorneys employed; but the court decided the case adversely to that contention. The court stated, regarding another contention of appellant, that

the contention could be made only on the theory that the attorneys' contract with the creditors was so far extortionate as to amount to a fraud. But regarding that theory the court concluded:

But in support of this theory we find nothing in the record. The contract made between the creditors and the attorneys was one permissible under the laws of this state, whatever may be the rule elsewhere, and it would seem that the mere statement of the facts is sufficient to show that it was not unconscionable.

It should be noted that, as the court stated (at p. 87) the litigation against Levinson was successful and sufficient property was discovered and brought into the bankrupt estate to pay the costs of the litigation, the face of the claims against Levinson in full, and a considerable part of the accrued interest on the claims. The value of the property recovered, therefore, apparently was in the neighborhood of \$125,000 and the amount of the 50% contingent fee in the neighborhood of \$62,500.

In *Albert v. Munter*, 136 Wash. 164, 239 Pac. 210, the plaintiff, Albert, sued Adolph Munter, et al., doing business as Munter & Munter, to recover property held under a claim of lien for attorneys' fees. Judgment for the defendants was affirmed by the Supreme Court. The property was held by Munter & Munter under a claim of lien for an attorney and solicitors' fee of \$8187.98 alleged to be due them for securing the return by the Federal Alien Property Custodian to Mr. Albert

of property of the value of about \$32,000 seized during the war. As stated by the Supreme Court (at p. 165) regarding the contingent fee contract involved and the time when it was entered into:

Respondents claimed under a contract for attorneys' fees executed by appellant to them by which it was agreed that they should receive 25% of the amount recovered. The contract was not proposed nor entered into until some time after the employment had commenced, nor until suit had been brought by respondents for appellant against the alien property custodian, which later resulted in favor of appellant for the return of all the property seized.

As shown in quotation of the findings of the lower court (p. 172-175) Munter & Munter were employed by Mr. Albert in 1921 to perform various services; that employment developed into the work of securing the return of money and property which had been taken into custody by the Alien Property Custodian; and on March 3, 1923, Munter & Munter, with the consent and under the authority of Mr. Albert, instituted an equity action in the District Court of the United States for the Eastern District of Washington, for the establishment of Mr. Albert's status as a citizen of the United States and for the recovery of the seized property.

Prior to April, 1923, there was no agreement or contract between Mr. Albert and Munter & Munter as to the amount of compensation the attorneys

should receive for their services; but a few days prior to April 18, 1923, Munter & Munter discussed with Mr. Albert the amount of their compensation and presented to Mr. Albert and asked him to sign a 25% contingent fee contract. Mr. Albert signed the contract on April 18, 1923. At first, Mr. Albert refused to sign the contract proposed, declaring that the contingent fee requested was excessive and stating that he could get the same services for less. He was told to go and see other lawyers; and he did consult the firm of Graves, Kizer & Graves. He conferred with Mr. Kizer of that firm at some length; and Mr. Kizer informed him that, under all of the circumstances, Mr. Kizer thought a contingent fee of $33\frac{1}{3}\%$ of the amount recovered would be fair and reasonable.

In upholding the contingent fee contract, the Supreme Court referred to its earlier decision in *Beck v. Boucher*, 114 Wash. 574, 195 Pac. 996, and stated (136 Wash. 164, 176):

In the last cited case, this court held that an agreement for contingent attorney's fees, entered into without fraud or misrepresentation, is not void as against public policy, since we have a statute (cited in the decision) authorizing such contracts, and that a client who permits an attorney to spend time and money under a contract for a contingent fee, and accepts the benefits of the contract, is estopped to assert its invalidity on the ground that it was solicited and that it was against public policy. (Underscoring added.)

In this case, as the lower court found, and on the whole record, we have no doubt whatever that the contract in question was entered into fairly and understandingly, was acted upon by respondents with great skill, energy and fidelity, that their services were multifarious and valuable, that they could not have foreseen the ultimate result of their activities in behalf of appellant, and that a contingent contract for their attorney's fee on his and their part was almost unavoidable. We are, therefore, well satisfied to sustain the findings of the trial court as to the reasonableness, good faith and enforceability generally of the contract.

In *State ex rel. Hunt v. Okanogan County*, 153 Wash. 399, 280 Pac. 31, the Supreme Court upheld a 50% contingent fee contract made by Okanogan County with Hunt for services in preparing data and arguments and presenting the same before the Department of the Interior and the Congress, in support of the county's equitable and moral claim against the United States for a sum of money to provide a measure of compensation in lieu of taxes upon certain Indian allotments. The contract was with Clair Hunt, an engineer; and after entering into the contract in 1920 he compiled a large amount of the necessary data in that year and in 1921. Thereafter he assigned his interest in the contract to his son, Ward Hunt, a practicing attorney in the State of Washington, who continued performance of the contract. By Act of Congress

in 1928, provision was made for payment to the county treasurer of Okanogan County of the sum of \$77,435.31 in satisfaction of the claim of Okanogan County, which had been asserted for the sum of \$139,984.71. The sum of \$77,435.31 was paid by the United States to the treasurer of Okanogan County on August 7, 1928; and on the following day attorney Hunt presented to the commissioners of Okanogan County his claim for 50% of the sum, a claim for compensation in the amount of \$38,717.65. The county commissioners rejected and disallowed the claim and refused to pay the same or any portion thereof. Shortly thereafter attorney Hunt commenced a mandamus proceeding to compel payment in accordance with the 1920 contract entered into by Okanogan County, a municipal corporation acting through its then board of commissioners. The Superior Court gave judgment in favor of the defendants; but upon appeal the Supreme Court reversed the judgment and directed the county court to compel payment of the 50% contingent fee to attorney Hunt. .

The trial judge had rested his decision upon the theory that the contract was a lobbying contract, such as the courts hold to be void as against public policy; but the Supreme Court was of the opinion that the contingent fee contract was not, upon its face nor because of the manner of the rendering of the service, void as being against public policy.

It was also contended in behalf of Okanogan County and the other respondents that the contingent fee contract of the county with attorney

Hunt and his assignor was void for want of statutory power, express or implied, vested in the county commissioners to enter into such a contract. The Court decided against the county on this contention, and in its opinion (153 Wash., at p. 422) cited with approval the earlier decision in *Williamson v. Snohomish County*, 64 Wash. 233, 116 Pac. 675, in which the court had held that the county commissioners, under their general statutory powers and duties to care for the county's property and interests, were authorized to employ an alienist to aid the prosecuting attorney in a criminal prosecution, in which a defense plea of insanity had been made. As the court stated: "The general powers of the county commissioners were therefore invoked in that behalf (as authority for the contract with the alienist), and held legally sufficient to enable them to contract for such services and bind the county to pay therefor; * * *." And the court's opinion continued, with regard to attorney Hunt's contract with the municipal corporation of Okanogan County (153 Wash., at p. 423):

We are of the opinion that the employment of relator and his predecessor by the county commissioners was within their statutory powers. We do not concern ourselves in this case with the question of the wisdom of the making of the employment contract here in question. Indeed, we are not asked by counsel on either side to do so. We are only deciding that the commissioners had the power to make

the contract, and that, it being faithfully and effectually performed and the county having reaped the benefit thereof, relator is entitled to compensation according to the terms of the contract.

II.

Priest Rapids Irrigation District Had Authority to Enter Into the Contingent Fee Contract With Petitioners.

The district's board of directors not only had the authority, but was also under the duty, to do everything necessary to the defense by said district in the condemnation action. The authority of the district's board to make the contingent fee contract with Moulton & Powell and J. K. Cheadle was based upon statutes as broad as, or broader than, those relied upon in *State ex rel. Hunt v. Okanogan County*, 153 Wash. 399, 280 Pac. 31. Moreover, the district's board had the authority of the August 1, 1946, decree entered by the Superior Court of the State of Washington in and for Benton County in cause No. 8035, entitled *C. I. Wright and Mamie Wright, husband and wife, B. Salvini, J. H. Evett and Priest Rapids Irrigation District*, a municipal corporation of the State of Washington, *v. Chapman, et al.*

Remington's Revised Statutes, Section 7428, regarding an irrigation district's board of director's, provides that:

The board shall have the power, and it shall be its duty, * * * to make and execute all necessary contracts, * * * and generally to perform

all such acts as shall be necessary to fully carry out the provisions of this chapter, * * * .

Remington's Revised Statutes, Section 7431, authorizes and empowers the board of directors:

to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this chapter, or to enforce, maintain, protect, or preserve any and all rights, privileges, and immunities created by this chapter, or acquired in pursuance thereof; and in all courts, actions, suits, or proceedings, the said board may sue, appeal, and defend, in person or by attorney, and in the name of such irrigation district.

And the Benton County court in the above-mentioned decree ofg August 1, 1946, ordered, adjudged and decreed:

That plaintiffs B. Salvini and J. H. Evett are de facto directors of the Priest Rapids Irrigation District and that, until further order or decree of this Court as hereinafter provided for, said plaintiffs shall continue to function as directors of said district and in particular shall do any and all things necessary to the defense by said district against the petitioner in the condemnation action of United States of America v. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and necessary to protect otherwise the interests

of said district; and that pursuant to vouchers approved by said de facto directors, the County Auditor of Benton County, Washington, shall issue warrants, and the County Treasurer of Benton County, Washington, shall pay said warrants, in the same manner and with the same effect as provided by the laws of the State of Washington with respect to vouchers approved by irrigation district directors.

For the convenience of the Court, a copy of the entire said decree of August 1, 1946, is attached to these Points and Authorities as Exhibit "A." A certified copy will be offered in evidence at the hearing on January 5, 1950.

It is submitted that the authority of the district's board to make the contingent fee contract is explicit in the above-quoted statutes. Beyond question such authority is within the object, spirit and meaning of the Washington statutes regarding irrigation districts. And the controlling canon of statutory construction is as stated (and applied) in *State ex rel. Thorp v. Devin*, 26 Wn. (2d) 333, 345, 173 P. (2d) 994:

The general purpose or spirit of a legislative act must always be held in view, and absurd consequences avoided as far as possible. *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L.R.A. 302; *State v. Asotin County*, 79 Wash. 634, 140 Pac. 914; *In re Horse Heaven Irr. Dist.*, 11 Wn. (2d) 218, 118 P.(2d) 972; *Martin v. Department of Social Security*, 12 Wn. (2d) 329,

121 P. (2d) 394. A thing which is within the object, spirit, and meaning of a legislative act is as much within the act as if it were within the letter. State ex rel. Spokane United Rys. v. Department of Public Service, 191 Wash. 595, 71 P.(2d) 661; 2 Lewis' Sutherland Statutory Construction (2d ed.) secs. 369, 379. (Underscoring added.)

And as the Supreme Court of the State said in *Beasley v. Assets Conservation Co.*, 131 Wash. 439, 443, 230 Pac. 411, in upholding the validity of a contract under which warrants were issued by an irrigation district:

Its (district's) powers are not only such as are granted in express words, but also those necessary or fairly implied in or incident thereto or indispensable to its declared objects and purposes.

Moreover, the State Supreme Court allows irrigation districts' boards of directors to exercise wide latitude of discretionary judgment. In *Hanson v. Kittitas Reclamation District*, 75 Wash, 297, 313, 134 Pac. 1083, the action involved the question of whether the district board should be enjoined from incurring further indebtedness in behalf of the district until a water supply was secured from some certain source; and in refusing the injunctive relief and upholding the board, the Supreme Court stated:

The board of directors are clothed by the statute with a wide discretion as to the man-

ner in which they shall manage the business of the district, and the courts are not warranted in interfering on any mere question of good business policy. Nothing short of a gross abuse of their powers will warrant such an interference.

Moreover, the authority of the de facto directors of the Priest Rapids Irrigation District to act for the district and to defend the condemnation action is clear and is *res adjudicata* in the above entitled cause. Their authority was attacked by the Government's "motion for appointment of trustee or receiver and for restraining order" filed on May 6, 1946. The Government by that motion sought to have this Court appoint a trustee or receiver of the district, and sought to have this Court enjoin the district and its de facto officers from proceeding further as plaintiffs in the Benton County court proceeding of *Wright et al. v. Chapman et al.*, No. 8035. In said motion the Government contended, among other things, that the Benton County court was without jurisdiction and that the officers of the district were disqualified to act for or on behalf of the district. Said motion was argued on May 15, 1946, and on June 1, 1946, this Court announced its decision denying the motion. And the Government did not appeal from the order of this Court, entered June 26, 1946, denying the motion.

III.

Payment of the Contingent Fee from the Money
Paid Into This Court in Satisfaction of the
Deficiency Judgment in Favor of the District
Is Proper

The Priest Rapids Irrigation District, its de facto directors and its attorneys in good faith and upon reasonable grounds defended the condemnation action brought by the Government. Furthermore, they defended it successfully. Their defense resulted in a deficiency judgment in favor of the district and against the Government for \$422,252.80, which represents \$302,856.00 in additional value of the properties condemned and \$119,396.80 in interest. The deficiency judgment in favor of the district is the product of the successful defense; and it is an asset of the district.

The deficiency judgment orders, adjudges and decrees that the only person having an interest in and to the compensation fixed by the judgment is the Priest Rapids Irrigation District, a public corporation. Said district by its resolution of November 19, 1949 (Exhibit "B" of the petition), has approved the determination and computation of the fee due and payable under the contingent fee contract and has consented to payment of the fee from the proceeds of the deficiency judgment.

Even if the Government, in the Benton County court proceedings for winding up the affairs of the district, should succeed in establishing a right to have the district's assets distributed to the Govern-

ment, the district's attorneys' fees and expenses incurred in unsuccessfully contesting the Government in the state court proceedings could be charged against the assets involved in the state court proceedings.

In *Watson v. Johnson*, 174 Wash. 12, 16, 17, 24 P. (2d) 592, the receiver of a savings and loan association contested allowance of claims for attorneys' fees and other litigation expenses incurred by the association's de facto directors in resisting (unsuccessfully) the application for appointment of a receiver. The de facto directors sought to effect a voluntary liquidation, but they unsuccessfully contested the application of the state director of efficiency for appointment of a receiver. The receiver appealed from the trial court's allowance of attorneys' fees and costs incurred by the de facto directors in resisting the receivership in the state court. The Supreme Court affirmed the trial court, except for revising upward the amount of the attorneys' fees allowed.

In explanation of its decision, the Supreme Court stated (174 Wash., at p. 16):

The principle upon which an allowance is made is that counsel fees and costs of the litigation are in the nature of expenses incurred by the corporation and its directors in the protection and preservation of the trust which they represent; and even if it turns out that a case is made for interference by the appointment of a receiver and the dissolution of the

corporation, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and the fund involved in the litigation to the expenses incurred in discharging a general duty cast upon the corporation and its directors to take all reasonable means for its protection.

In view of *Watson v. Johnson*, *supra*, it is clear that in this condemnation action the attorneys' fee for the successful defense by the district should be paid from the proceeds of the deficiency judgment in favor of the district.

IV.

The Contingent Fee Is Reasonable

The contingent fee is slightly less than 20% of the deficiency judgment, computed after deducting expenses.

This Court is fully aware of the novelty and difficulty of the questions involved in the condemnation action. Here reference is made only to Judge Schwellenbach's statement, in his memorandum opinion of June 21, 1945:

we have presented here an anomalous situation in which very little benefit can be derived from other cases.

and to this Court's statement in the oral opinion of June 1, 1946:

we have here a peculiar situation. If there has been a case before where the Government has taken over the entire irrigation system and all of the lands of the system and all of the works and properties of the district in one stroke, as has been effected here, that case has not been called to the Court's attention.

When the contingent fee contract was made in 1946 it seemed likely that the case would be carried to the Supreme Court of the United States. It was appealed to the Court of Appeals; and not until September, 1949, was it determined that Supreme Court review would not be sought.

A great amount of time and labor was required properly to conduct the case.

The compensation to the attorneys was contingent, except for the two thousand dollars paid by the district in 1943. And the contingency upon which the contingent fee depended required not only success in the matter of valuation of the district's properties but also success against the government's contention that as a matter of law no additional compensation was due the district, regardless of what the value of the district's properties might be.

The above-mentioned factors and other factors show that the contingent fee was reasonable.

In *Hardman v. Brown*, 153 Wash. 85, 279 Pac. 91, a 50% contingent fee was upheld. In *Albert v. Munter*, 136 Wash. 164, 239 Pac. 210, a 25%

contingent fee was upheld. In *State ex rel. Hunt v. Okanogan County*, 153 Wash. 399, 280 Pac. 31, a 50% contingent fee contract with a municipal corporation was upheld.

In this case, considering all relevant factors, it is submitted that the contingent fee could have been considerably larger and still have been reasonable.

If the condemnation case had been decided in accordance with the Government's contentions, there would have been no award in excess of the amount deposited in Court; and the district's attorneys would not have received any compensation beyond the two thousand dollars paid by the district in 1943. In that event, the attorneys' time and efforts (and their substantial out-of-pocket expenditures for office overhead, less only the two thousand dollars) would have been uncompensated. Instead, the litigation was successful and resulted in a deficiency judgment in favor of the district in the total sum of \$422,252.80. The district by its resolution of November 19, 1945, has approved termination of the fee payable to the district's attorneys under the contingent fee contract in the sum of \$78,918.85, and has consented to its payment by the Clerk of this Court from the money paid into Court in satisfaction of the deficiency judgment.

In view of the foregoing Points and Authorities, and the evidence to be adduced at the hearing on January 5, 1950, this Court should enter the order

prayed for in the petition for payment of attorneys' fee.

Respectfully submitted,

MOULTON & POWELL,

By /s/ CHARLES V. POWELL,

/s/ J. K. CHEADLE,

Petitioners and Attorneys for the Priest Rapids
Irrigation District.

Exhibit "A"

In the Superior Court of the State of Washington
in and for Benton County

No. 8035

C. I. WRIGHT and MAMIE WRIGHT, Husband
and Wife, B. SALVINI, J. H. EVETT, and
PRIEST RAPIDS IRRIGATION DIS-
TRICT, a Municipal Corporation of the State
of Washington,

vs.

HARLEY E. CHAPMAN, COUNTY AUDITOR
of BENTON COUNTY, WASHINGTON, and
C. W. NESSLY, County Treasurer of Benton
County, Washington,

Defendants.

DECREE

The above-entitled cause having come on for trial on the 12th day of July, 1946, the plaintiffs being represented by their attorney, J. K. Cheadle, and the defendants by their attorney, Andrew

Brown; said cause, pursuant to stipulation of counsel, having been consolidated for purposes of trial with the action of Dietrich, et al. v. Chapman et al., No. 7987; and A. E. Taylor, successor of Harley E. Chapman as County Auditor of Benton County, on motion made in open court and pursuant to consent of his attorney, appearing for him, having been substituted for said Harley E. Chapman as a party defendant; and a suggestion of want of jurisdiction of this Court having been presented by the Suggestion of Interest filed herein by the United States of America on May 1, 1946, and an analogous question of jurisdiction having been decided previously in favor of the jurisdiction of this Court by this Court's denial on April 11, 1946, of the motion to quash and dismiss filed in said action No. 7987 by the United States of America under special appearance for that purpose, and the jurisdiction of this Court in the above entitled cause having been upheld by the denial of the motion for appointment of trustee or receiver and for restraining order filed by the United States of America on May 6, 1946, in the United States District Court for the Eastern District of Washington in United States v. Alberts, et al., Civil No. 128, and denied by the order of said Court entered on June 26, 1946, and this Court having decided on July 12, 1946, in conformance with said prior decisions and contrary to said suggestion, that this Court has jurisdiction, and accordingly having proceeded to trial on the merits; and upon said trial it appearing to the Court, and being so found by the Court, that the

facts are as alleged in the complaint and in particular that the defendants, although acting in good faith, have threatened to refuse to issue and pay warrants on the funds of the Priest Rapids Irrigation District on the basis of vouchers approved by the plaintiffs B. Salvini and J. H. Evett; and the court, upon consideration of the facts and the applicable law and being fully advised in the premises, having concluded that the plaintiffs are entitled to a decree granting relief against the defendants and making provisions for further appropriate proceedings;

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed: That plaintiffs B. Salvini and J. H. Evett are de facto directors of the Priest Rapids Irrigation District and that, until further order or decree of this Court as hereinafter provided for, said plaintiffs shall continue to function as directors of said district and in particular shall do any and all things necessary to the defense by said district against the petitioner in the condemnation action of United States of America v. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and necessary to protect otherwise the interests of said district; and that pursuant to vouchers approved by said de facto directors, the County Auditor of Benton County, Washington, shall issue warrants, and the County Treasurer of Benton County, Washington, shall pay said warrants, in the same manner and with the same effect as provided by the

laws of the State of Washington with respect to vouchers approved by irrigation district directors.

It Is Further Ordered, Adjudged and Decreed that this Court retains jurisdiction of this cause for appropriate supervision of the administration of said irrigation district and for further appropriate proceedings directed toward dissolution of said district and distribution of the assets of said district.

It Is Further Ordered, Adjudged and Decreed that any award in the condemnation action, United States of America v. Clements P. Alberts, et al., Civil No. 128, which may be ordered by the District Court of the United States for the Eastern District of Washington to be paid to the Priest Rapids Irrigation District, shall upon receipt by said district be paid into this Court, to be paid out upon order of this Court after further appropriate proceedings.

It Is Further Ordered, Adjudged and Decreed that within a period of sixty days after final decision in said condemnation action, including final disposition of any appeal or review proceedings therein, said de facto directors shall report to this Court the final decision in said condemnation action and shall suggest, by petition to this Court, such proceedings directed toward dissolution of the Priest Rapids Irrigation District, appointment of trustees and distribution of the assets of said district as shall be deemed by them to be appropriate.

Done in open court this 1st day of August, 1946.

/s/ TIMOTHY A. PAUL,

Judge of the Superior Court.

Presented by

/s/ J. K. CHEADLE,

Attorney for Plaintiffs.

Approved as to Form

/s/ ANDREW BROWN,

Attorney for Defendants.

[Endorsed]: Filed January 5, 1950.

[Title of District Court and Cause.]

CROSS APPELLANTS' STATEMENT
OF POINTS ON APPEAL

1. The District Court erred in ruling that payment of attorneys' fee to Moulton & Powell and J. K. Cheadle, attorneys for the Priest Rapids Irrigation District, in the sum of \$78,918.85 from the registry of the above-entitled court should not be made in accordance with the petition of Moulton & Powell and J. K. Cheadle, and in accordance with the resolution of the Priest Rapids Irrigation District board of directors approving and consenting to payment of the contract attorneys' fee in said amount from the \$422,252.80 paid into the District Court in satisfaction of the deficiency judgment in favor of said district.

2. The District Court erred in concluding upon consideration of all relevant matters that the sum of \$55,000.00 is appropriate and reasonable compensation for the services in this condemnation action which have been performed by the attorneys for the Priest Rapids Irrigation District on what was necessarily a contingent basis, and in failing to conclude upon consideration of all relevant matters that the sum of \$78,918.85 is appropriate and reasonable compensation for said services.

3. The District Court erred in ordering that \$55,000.00 be withdrawn from said sum of \$422,252.80 for the payment of attorneys' fee to Moulton & Powell and J. K. Cheadle and in refusing to order that the sum of \$78,918.85 be so withdrawn from said \$422,252.80 for such payment.

MOULTON & POWELL and
J. K. CHEADLE,

By /s/ CHARLES L. POWELL,
Cross Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The district court erred in entering the order appealed from.

2. The district court erred in holding that the appellees were entitled to be compensated for their

legal services rendered in the condemnation proceedings against the Priest Rapids Irrigation District out of the sum paid in satisfaction of the judgment entered in that case.

/s/ A. DEVITT VANECH,
Assistant Attorney General.

BERNARD H. RAMSEY,
Special Assistant to the
Attorney General.

/s/ JOHN F. COTTER,
Attorney, Department of
Justice, Washington, D. C.

[Endorsed]: Filed May 31, 1950.

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision

No. 128-99

UNITED STATES OF AMERICA,

Petitioner,

vs.

CLEMENTS P. ALBERTS, et al., and PRIEST
RAPIDS IRRIGATION DISTRICT, a Muni-
cipal Corporation of the State of Washington,
Defendants.

Before: Honorable Sam M. Driver,
United States District Judge.

Appearances:

BERNARD H. RAMSEY,

Special Assistant to the Attorney General,
Department of Justice, of Yakima,
Washington,

For the petitioner United States of
America.

CHARLES L. POWELL, of
MOULTON & POWELL,

Kennewick, Washington, and

J. K. CHEADLE,

Spokane, Washington,

For the defendant Priest Rapids Irri-
gation District and the petitioning
attorneys.

RECORD OF PROCEEDINGS AT THE HEARING ON PETITION FOR PAYMENT OF ATTORNEYS' FEE

Be It Remembered that the above-entitled cause came on before the Honorable Sam M. Driver, Judge of the above-entitled Court, at Yakima, Washington, on Thursday, January 5, 1950, for hearing upon petition for payment of attorneys' fee and other matters; the petitioner United States of America being represented by Bernard H. Ramsey, Special Assistant to the Attorney General, Department of Justice, of Yakima, Washington, the defendant Priest Rapids Irrigation District and the petitioning attorneys being represented by Charles L. Powell of Moulton & Powell, of Kennewick, Washington, and J. K. Cheadle, of Spokane, Washington, whereupon the following [34*] proceedings were had and done, to wit:

The Court: Do you have witnesses as to the reasonableness of the fee, Mr. Powell?

Mr. Powell: Yes, your Honor.

The Court: Well, they should be put on first.

Mr. Powell: I might state there are three matters, and I'm not sure what counsel's position is as to the other two.

The Court: I didn't get that very clearly either.

Mr. Ramsey: As to the petition for the payment of the outstanding certificates of indebtedness, it appears to me that is an obligation which has been incurred by the District and must necessarily be met. I haven't any disposition to haggle around here

* Page numbering appearing at bottom of page of original Reporter's Transcript.

about what the certificates were sold for. Actually the District obligated itself for \$8,000, and I don't consider that it's any particular business of mine, and I'm not going to ask the court to make it any business of his as to just what they realized out of those certificates of indebtedness. I think I shall interpose no objection whatever to an allowance from the funds in this court for the payment of those certificates of indebtedness. As to the cost bill, there are a number of items in that cost bill that I would very much like to inquire into.

The Court: That's the two thousand and something, isn't it?

Mr. Ramsey: Yes. [35]

The Court: The outstanding indebtedness is \$8,000, and then there's \$2100.00 that the District is claiming for expenses?

Mr. Powell: \$2,805.00.

The Court: Is that claimed as expenses in the litigation here in Federal court?

Mr. Powell: Yes, your Honor; it exceeded \$8,000, and against that was credited the \$6,000 we received from the sale of the certificates of indebtedness, leaving a balance of \$2,000 plus.

The Court: Very well, I think I understand your attitude, then.

Mr. Powell: Then if I may, if your Honor please, in connection with the certificates of indebtedness, if your Honor would wish me to do so, file the original certificates and receipts showing payment of the money, and then we can prepare and enter an order.

The Court: Well, as I understand it, Mr. Ramsey is questioning the amount of expense that you incurred or claim that you had incurred in the prosecution of this litigation in this court and the Court of Appeals. It would be difficult, I think, to divide that, because part of it was paid with the receipts of your sale of the warrants of the District, wasn't it?

Mr. Powell: Yes. [36]

The Court: You couldn't sell them at par, but what you realized was about \$6,000, then added to that was a \$2,000 deficiency. I assume if Mr. Ramsey is going to question the propriety of your expenditures he'd have to go into the \$6,000 as well as the \$2,000.

Mr. Ramsey: That is correct, your Honor. The \$6,000 has been paid over to them, and the party who purchased those certificates must be repaid. As to the so-called cost bill and the further petition that this court allow an additional sum of \$2805.00, as to that I do desire to go into a number of items appearing in the so-called cost bill.

The Court: I understand what you mean; these certificates of indebtedness are outstanding and Mr. Ramsey concedes that they should be paid, then the controversy necessarily must limit itself to whether you should be allowed an additional \$2800.00, but whether you should or not would, I should think, depend upon the propriety of all your expenditures there.

Mr. Powell: I thought perhaps we could dispose

of the one petition for payment of the certificates of indebtedness, but if not, we'll let that ride.

The Court: I think we can, yes.

Mr. Ramsey: Oh, yes.

Mr. Powell: Then we can agree on an order, and if your Honor wants me to, I can file the original certificates.

The Court: All right. [37]

Mr. Powell: And a certified copy of the order.

Mr. Ramsey: I presume if you do that you will in your order provide that the clerk of this court shall pay to the holder of those certificates of indebtedness the face sum of the certificates, or the \$8,000.

Mr. Powell: Plus the interest that they bear.

Mr. Ramsey: Well, I assume so, yes.

The Court: They're to be paid by the clerk directly to the holders?

Mr. Cheadle: We have prepared an order on that, your Honor; the order if found agreeable and signed by the court would call for the clerk to pay the \$8,000 face value plus interest at the rate of 4 per cent to the holder of the certificates upon their surrender of the certificates to the clerk of the court.

The Court: You haven't got that order prepared, have you?

Mr. Cheadle: Yes; it's been presented to Mr. Ramsey.

Mr. Ramsey: I have no objection to the order other than I question the propriety of the statement that the proceeds of said certificates of indebtedness were used by the Priest Rapids Irrigation District

in paying the costs and expenses of the defense of the above-entitled cause. Until inquiry is made I'm not prepared to concede that the whole sum was so paid. [38]

The Court: I don't think I got over my point awhile ago. I was trying to say that Mr. Ramsey concedes, he has no objection to the payment of the warrants, but he doesn't thereby admit that the proceeds was properly spent in the prosecution of this case.

Mr. Ramsey: That's what I meant, and other than that one recitation in the order, I have no objection to the order.

The Court: Well, that isn't essential to the order, is it, Mr. Powell?

Mr. Powell: I think not.

The Court: What you want is to get them paid, and you can leave out the recitation of what was done with the money.

Mr. Ramsey: The particular portion I object to is: "and that the proceeds of said certificates of indebtedness were used by the Priest Rapids Irrigation District in paying costs and expenses incurred by said District in its defense in the above-entitled cause."

The Court: Have you any objection to striking that out?

Mr. Powell: No, your Honor; it's a recitation.

The Court: I think so. Other than that you have no objection?

Mr. Ramsey: Other than that I have no objection.

The Court: Are these other gentlemen here as witnesses?

Mr. Powell: Yes, sir.

The Court: I wonder if you might not call them and have [39] them testify, and then we can argue the rest of the matters out in their absence.

Mr. Powell: I would be glad to do that. We'd like to make this statement, however, that there is a contract between the irrigation district and the directors and the attorneys, and that that contract, the only issue we understood your Honor would be interested in hearing is whether that contract, being a contingent contract, was a fair and reasonable contingent fee contract under the circumstances. Now, of necessity all of the services performed were to be compensated for on a contingent basis because of the fact there was no money if there was no fund.

The Court: And also it's true, is it not, that there was a substantial conflict as to all of that part of a possible award on which you could get your percentage of recovery? The government conceded it should pay \$169,000, the amount of the bonds, but you were not to take any part of that?

Mr. Powell: That's right.

The Court: And the government was seriously contesting your right to recover anything over the \$169,000?

Mr. Powell: That's correct.

The Court: I understand; I think that should be the basis of the testimony, not what would be a fair and reasonable value of the services rendered, but was it a fair and reasonable compensation on a con-

tingent basis under the circumstances [40] that existed and the work to be done.

Mr. Powell: That's correct. I don't know whether under those circumstances it would be necessary for us to detail all of the work we had done except to give a general idea of what it was. I think perhaps we had better proceed by putting on the secretary of the District to prove the circumstances of the contract and the execution of it, unless there's no question about it.

The Court: All right. [41]

R. S. REIERSON

called as a witness on behalf of the petitioning attorneys, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cheadle:

Q. State your name to the reporter, please.

A. R. S. Reiersen.

Q. Are you now secretary of the Priest Rapids Irrigation District, Mr. Reiersen? A. I am.

Q. For how long have you occupied that position, approximately?

A. I think approximately since March, 1944.

Q. Prior to March, 1944, were you a director of the Priest Rapids Irrigation District?

A. I was a director.

Q. For a time back as far as 1942?

A. I was on my second term of three years.

Q. And that would go back farther than that date? A. Yes.

(Testimony of R. S. Reiersen.)

(Whereupon, agreement August 20, 1946, was marked petitioner's Exhibit No. 1 for identification.)

(Whereupon, resolution dated November 19, 1949, was marked petitioner's Exhibit No. 2 for identification.) [42]

Q. Handing you, Mr. Reiersen, a paper that has been marked petitioner's identification number 1, will you state briefly what that is?

A. That is an agreement entered into between the Priest Rapids Irrigation District and attorneys Moulton & Powell on August 30, 1946.

Q. Is it an executed counterpart of the contract?

A. It is, yes.

Q. If the Court will permit I'll have both of the documents identified and hand them to counsel at the same time. Handing you what has been marked petitioner's 2, will you state what it is?

A. It is a resolution of the board of directors of the Priest Rapids Irrigation District regarding payment of attorneys' fees to Moulton & Powell and J. K. Cheadle.

Q. What date does it bear?

A. Passed by the board of directors of the Priest Rapids Irrigation District this 19th day of November, 1949.

Q. Is that an executed counterpart of that resolution, bearing the seal of the district?

A. Yes.

Mr. Cheadle: We offer as exhibit 1 the paper

(Testimony of R. S. Reiersen.)

that's been marked as identification number 1 and identified by the witness.

Mr. Ramsey: No objection. [43]

Mr. Cheadle: No objection to either, Mr. Ramsey? We also offer number 2, the resolution.

Mr. Ramsey: No objection.

The Court: Number 1 and number 2 will be admitted.

(Whereupon, petitioner's Exhibits No. 1 and 2 for identification were admitted in evidence.)

PETITIONER'S EXHIBIT No. 1

This Agreement made and entered into this .. day of1946, by and between Priest Rapids Irrigation District, hereinafter designated "District," and Moulton & Powell and J. K. Cheadle, hereinafter designated "Attorneys," Witnesseth:

Whereas, an action is now pending in the United States District Court, for the Eastern District of Washington, Southern Division, involving condemnation of property of the District, and Moulton & Powell have been heretofore employed to protect the interests of the District, and certain payments have been made to them under said contract; and whereas it has developed that said litigation is much more involved and the likelihood of appeal is much greater than initially contemplated;

Now, Therefore, it is hereby mutually understood and agreed that the District does hereby employ the

(Testimony of R. S. Reiersen.)

attorneys to represent it in the above-described action and that the Attorneys will give their best efforts and all time necessary to the proper preparation and presentation of the case in behalf of the District.

The Attorneys acknowledged and accept the sums heretofore paid to them in cash in the sum of \$2000.00 as the only retainer or certain fee. In addition to said cash retainer or certain fee, the District will pay to the Attorneys a contingent fee based upon percentages of the amounts by which the condemnation award exceeds \$169,850.00 (the amount of the District's bonded indebtedness paid with money deposited by the Government in court in said condemnation case). Said percentages shall be as follows:

30% of the first \$100,000.00 in excess of \$169,850.00.

20% of the second \$100,000.00 in excess of \$169,850.00.

10% of the third \$100,000.00 in excess of \$169,850.00.

5% of all additional amounts in excess of \$169,850.00.

It is understood and agreed that in the event the condemnation award does not exceed \$169,850.00, then no fee in addition to said cash retainer or certain fee will be paid to the Attorneys.

The District agrees to pay all of the costs necessary in the proper presentation of said case for

(Testimony of R. S. Reiersen.)

trial and on all appeals and will furnish all necessary information to the Attorneys on request.

The Attorneys agree that, before any computation of the additional, contingent fee shall be made, there shall first be deducted from the award and reimbursed to the District the amount paid by the District as costs. The Attorneys also agree that they will allow as a credit upon any additional, contingent fee to be paid to the Attorneys the sum of \$2000.00 heretofore paid as the cash retainer or certain fee.

This agreement shall not be binding upon the directors of the District personally in any manner, in the event the Court should hold that they as directors are not authorized to make it.

This contract shall supersede the contract heretofore made between the district and Moulton & Powell.

Dated this 30th day of August, 1946.

PRIEST RAPIDS

IRRIGATION DISTRICT,

By /s/ B. SALVINI,
President.

[Seal] /s/ R. S. REIERSON,
Secretary.

MOULTON & POWELL,

By /s/ CHARLES L. POWELL,
/s/ J. K. CHEADLE.

1/5/50.

(Testimony of R. S. Reiersen.)

PETITIONER'S EXHIBIT No. 2

RESOLUTION OF THE BOARD OF DIRECTORS OF THE PRIEST RAPIDS IRRIGATION DISTRICT REGARDING PAYMENT OF ATTORNEYS' FEE TO MOULTON & POWELL AND J. K. CHEADLE

Whereas, the Priest Rapids Irrigation District by its Board of Directors entered into a contract with Moulton & Powell and J. K. Cheadle on the 30th day of August, 1946, employing said attorneys to represent said District in the condemnation action of the United States of America v. Alberts, Priest Rapids Irrigation District, et al., No. 128-99 in the United States District Court for the Eastern District of Washington; and

Whereas, said attorneys have performed said contract by representing said District in said cause in said District Court and in the Court of Appeals for the Ninth Circuit; and

Whereas, following disposition of said cause by the Court of Appeals neither party petitioned for review by the Supreme Court of the United States; and the disposition of said cause by the Court of Appeals thus became final; and

Whereas, in accordance with said contract with said attorneys, it has been determined by the Board of Directors of said District that the expenses incurred by said District as expenses and costs in the defense of said action amount to \$6805, that said

(Testimony of R. S. Reiersen.)

sum deducted from the condemnation award of \$302,856 leaves a balance of \$296,051.00 as the basis for computation of the fee in accordance with said contract; and that said fee thus computed, less the credit of \$2000.00 allowed for the cash retainer or certain fee heretofore paid, together with interest at the rate of 6% per annum allowed in the condemnation judgment and computed for the purposes of said contract from October 1, 1943, to December 1, 1949, amounts to \$78,918.85.

Now, Therefore, Be It Resolved that said determination and said computation of said fee due and payable said attorneys under said contract in the sum of \$78,918.85 be and hereby is approved and that consent of said District be and hereby is given to payment of said sum of \$78,918.85 to said attorneys by the Clerk of said District Court from the sum paid or to be paid into the registry of said Court in said cause, Docket No. 128-99.

Passed by the Board of Directors of the Priest Rapids Irrigation District this 19th day of November, 1949.

/s/ B. SALVINI,

President and Director.

/s/ J. H. EVETT,

Director.

Attest:

[Seal]: /s/ R. S. REIERSON,
Secretary.

1/5/50.

(Testimony of R. S. Reiersen.)

Mr. Cheadle: That is all, Mr. Reiersen.

Cross-Examination

By Mr. Ramsey:

Q. I notice that referring now to plaintiff's or to petitioner's exhibit 1, that in paragraph 2 of this instrument is the following recitation: "Whereas, an action is now pending in the United States District Court, for the Eastern District of Washington, Southern Division, involving condemnation of property of the District, and Moulton & Powell have been heretofore employed to protect the interests of the District, and certain payments have been made to them under said contract; and whereas it has developed that said litigation is much more involved and the likelihood of appeal is much greater than initially contemplated; now, therefore——"——there was a contract entered into with Moulton and Powell in 1943?

A. Yes.

Mr. Cheadle: Just a moment, please. We will object to the question and move that it and the answer be [44] stricken as not proper cross-examination. Apparently this is part of Mr. Ramsey's case. If the Court deems fit that we go into what I gather is the government's position, we will do that. We were proceeding to put in our case in line with the preliminary statements made to the Court.

The Court: Well, in view of the fact that the

(Testimony of R. S. Reiersen.)

contract itself mentions the prior contract, I think Mr. Ramsey has the right to inquire into it on cross-examination. I'll overrule the objection.

(Whereupon, the reporter read the last previous question and answer.)

Q. (By Mr. Ramsey): Under which Moulton & Powell were to represent the District in any legal action that might grow out of the condemnation action which the government had filed against the properties of the District, is that correct?

Mr. Cheadle: Just a moment, please. Object to that, your Honor, on the ground it is not the best evidence, if there was a previous contract, and in view of your Honor's ruling on the previous question and answer, if your Honor sees fit to have that we will put in the best evidence right now.

Mr. Ramsey: I don't have that contract; it is mentioned in this contract; I think I have a right to inquire into that contract.

The Court: Then you can find out whether it's written or not.

Q. (By Mr. Ramsey): Is that correct?

A. There was a contract drawn up in October, I think, 1943.

Q. Was that a written contract?

A. Prior to that the directors passed resolutions engaging Moulton & Powell to represent them, and authorized the payment of \$2,000.00.

The Court: I'm not sure that you understood the question, Mr. Reiersen. I don't believe it was

(Testimony of R. S. Reiersen.)

directly answered. Counsel asked you if it was a written contract.

A. Yes, it was a written contract.

Q. Is that contract in the records of the District and in your possession?

A. We have it, yes. We have a record.

Q. Is it here in court today? A. Yes.

Mr. Ramsey: If counsel desires to put that contract into evidence at this time it might possibly shorten up the cross-examination here in regard to its contents.

Mr. Cheadle: In view of the scope of cross-examination permitted by your Honor, if agreeable to the Court and counsel I will proceed to put in other documentary evidence which lies behind that contract about which counsel contends.

Mr. Ramsey: Our position frankly is that the whole [46] thing is one transaction.

The Court: Yes, I think it should be put in, perhaps, if you wish to reserve the rest of your cross-examination.

Mr. Ramsey: I do, if the Court please, and at this time I will permit counsel to introduce such other documents as he desires.

Further Direct Examination

By Mr. Cheadle:

(Whereupon, minutes of directors' meeting held March 9, 1943, was marked Petitioner's Exhibit No. 3 for identification.)

(Testimony of R. S. Reiersen.)

Q. Mr. Reiersen, I hand you what has been marked for identification number 3, and ask you to state what it is?

A. Minutes of the special meeting of the board of directors of the Priest Rapids Irrigation District held on March 9, 1943, held at the office of Moulton & Powell in Kennewick, March, 1943.

Mr. Cheadle: I offer in evidence as petitioner's Exhibit 3 what has been marked for identification as number 3 and identified by the witness.

Mr. Ramsey: No objection.

The Court: It may be admitted.

(Whereupon, petitioner's Exhibit No. 3 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 3

Minutes of the Special Meeting of the Board of Directors of the Priest Rapids Irrigation District Held at the Office of Moulton & Powell in Kennewick, Washington, on March 9, 1943.

There were present at this meeting the following:

R. S. Reiersen, President

B. Salvini, Director

J. H. Evett, Director

Jos. W. Grell, Secretary

M. M. Moulton, Attorney.

This meeting was called by the President of the Board of Directors for the purpose of discussing

(Testimony of R. S. Reiersen.)

with the Board and Mr. Moulton the various means, ways and steps to be taken to fully protect the rights and interests of the Priest Rapids Irrigation District as well as the individual rights and interests of the land owners and water users under the project during the purchasing, acquiring or condemnation by the Army Engineers of the interests of the parties named.

After a full and lengthy discussion, a motion was made by Director Evett that the Attorneys known by the firm name of Moulton & Powell of Kennewick, Washington, be employed by the Priest Rapids Irrigation District to represent the Board of Directors in the settlement of matters concerning the purchase by the Army Engineers of the properties of the Priest Rapids Irrigation.

The motion was seconded by Director Salvini, was placed to a vote of the Directors, who, in return, approved of the motion by a unanimous vote, and is thereby duly passed.

There being no further business to come before the Board, the meeting was duly adjourned.

/s/ R. S. REIERSON,
President.

/s/ B. SALVINI,
Director.

/s/ J. H. EVETT,
Director.

(Testimony of R. S. Reiersen.)

Attest:

/s/ JOS. W. GRELL,
Secretary.

1/5/50.

(Whereupon, minutes of meeting held June 10, 1943, was marked [47] petitioner's Exhibit No. 4 for identification.)

(Whereupon, minutes of meeting held September 16, 1943, was marked petitioner's Exhibit No. 5 for identification.)

Q. I hand you, Mr. Reiersen, what has been marked as identification number 4, and ask you to state to the Court what it is?

A. It's the minutes of the continued regular meeting of the Board of Directors of the Priest Rapids Irrigation District held at its office in White Bluffs on June 10, 1943.

Q. I also next hand you, Mr. Reiersen, what has been marked as petitioner's identification 5, and ask you to state what it is?

A. Minutes of a special meeting of the board of directors of the Irrigation District held at the office of the Richland Irrigation District September 16, 1943.

Mr. Ramsey: What's the date of that?

Mr. Cheadle: September 16. I'll offer in evidence as petitioner's Exhibit No. 4 what has been marked as identification number 4.

(Testimony of R. S. Reiersen.)

Voir Dire Examination

By Mr. Ramsey:

Q. May I inquire of the witness who was the Secretary of the District on the 10th day of June, 1943? A. Joe Grell. [48]

Q. Well, may I further inquire why this so-called resolution or minutes of meeting was not attested by the secretary under his seal?

A. I suppose he overlooked it.

Q. May I inquire whether these minutes were actually prepared on the date that they purport to be prepared, June 10, 1943?

A. I suppose they were. I'm not prepared to say those——

Q. Well, do you know when they were prepared?

A. Pardon?

Q. Do you know when they were prepared?

A. He took the minutes of the meeting.

Q. Well, do you know who prepared these?

A. Joe Grell; he was secretary.

Q. This was done by Joe Grell?

A. Yes, he was at the meeting.

Q. Well, was this typewritten copy of the minutes prepared by Joe Grell? A. Yes.

Q. And do you know about when? I'm not asking for the exact date.

A. He prepared his minutes usually the next day, from his notes.

(Testimony of R. S. Reiersen.)

Q. Well, do you know whether that was followed in this case or not? [49] A. Pardon?

Q. Do you know whether that was followed in this case or not? A. I presume so.

Q. Well, frankly, Mr. Reiersen, what I'm trying to get at is this: We have something here that purports to be the minutes of the meeting of the board of directors; it has typed in at the top a date; it has been signed by the members of the board of directors; it has not been attested by the secretary; it's not under the seal of the district; I'm not trying to raise any technical objection here, but I do want to know when these signatures were placed on this document.

A. The signatures would be submitted by the board at the next meeting; the minutes would be read at the next meeting and signed by the board of directors.

Q. Do you know, Mr. Reiersen, that these signatures were appended to this instrument at the next meeting of the board of directors following the date that appears at the top, June 10, 1943?

A. I didn't understand your question.

Q. Do you know that these signatures of the board of directors were placed on this document at the next meeting of the board of directors following the date appearing at the top of the instrument, June 10, 1943? A. I am positive, yes. [50]

Mr. Ramsey: No objection.

The Court: It will be admitted.

(Testimony of R. S. Reiersen.)

(Whereupon, petitioner's exhibit No. 4 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 4

Continued Regular Meeting of the Board of Directors of the Priest Rapids Irrigation District Held at Its Office at White Bluffs, Washington, June 10, 1943.

This meeting was called by the President for the purpose of meeting with Moulton & Powell. Those present at the meeting were:

R. S. Reiersen, President
B. Salvini, Director
J. H. Evett, Director
Jos. W. Grell, Secretary
Mark M. Moulton, Attorney
Charles Powell, Attorney

Moulton & Powell, Attorneys for the District, wished to gather certain information for the completion of the brief to be presented to Judge Schwellenbach. This brief was to be presented to the Judge at the same time that the attorneys for the Army Engineers presented theirs.

A discussion of ways and means of paying the attorney fees to Moulton & Powell was discussed and it was decided that it would be agreeable to both the District and the Attorneys to make a payment of \$1000.00 in cash and a payment of \$1000.00

(Testimony of R. S. Reiersen.)

in District Warrants. The total amount of \$2000 being the amount required by Moulton & Powell to prepare the legal requirements of the District up to the time of condemnation proceeding, should such a step become necessary.

There being no other business before the Board to be taken care of at this time the meeting was continued by the president to June 14th.

/s/ R. S. REIERSON,
President.

/s/ B. SALVINI,
Director.

/s/ J. H. EVETT,
Director.

Attest:

.....
Secretary.

1/5/50.

Mr. Cheadle: We offer in evidence as the petitioner's Exhibit Number 5 the paper marked as identification 5.

Mr. Ramsey: This is objected to as not having anything to do with the attorney fees in the particular matter that is before the Court.

Mr. Cheadle: If you'll permit, I'll ask——

The Court: Are you offering 5 now?

Mr. Cheadle: Yes, your Honor. In response to the objection, if permitted I will ask another question or two on voir dire.

(Testimony of R. S. Reiersen.)

Q. (By Mr. Cheadle): Mr. Reiersen, number 5, being that which you identified as the minutes of September 16, 1943, and which referred to the Priest Rapids Irrigation District splitting expenses on some litigation coming up, did that have—was that groundwork, according to your recollection, which led to the District's passing a resolution authorizing a \$750.00 payment on expenses?

Mr. Ramsey: Objected to, if the Court please, for the reason already stated, as to this question. We're confronted here with the matter of what constitutes a reasonable attorney fee in the matter of the Priest Rapids [51] Irrigation District case. Now, if the District wanted to go out and pay some money on some private individuals' cases, I don't know what that's got to do with the attorney fee in this particular case.

The Court: I'll overrule the objection.

Mr. Cheadle: We're entirely agreeable with that, except that Mr. Ramsey in his brief filed makes reference to the \$750.00 expenses. We're happy at this time to withdraw——

Mr. Ramsey: Well, I don't know that if it can be considered as being part of the expenses it's properly in there.

The Court: Well, we'll admit it for that purpose, then. Is there any objection to 5? That's the one you're discussing now. Does this question pertain to that?

Mr. Cheadle: You have no objection to it if it's

(Testimony of R. S. Reiersen.)

admitted for the purpose of expenses, is that correct?

Mr. Ramsey: I don't concede that it has anything to do with proper expenditures, but I won't object to its introduction.

(Whereupon, petitioner's Exhibit No. 5 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 5

Minutes of the Special Meeting of the Board of Directors of the Priest Rapids Irrigation District
Held at the Office of the Richland Irrigation District on Sept. 16th, 1943.

There were present at the meeting:

R. S. Reiersen, President

B. Salvini, Director

J. H. Evett, Director

Jos. W. Grell, Secretary

Chas. Powell, Attorney

The Board of Directors and Secretary of the Richland Irrigation District.

B. Salvini made a motion that the White Bluffs Irrigation District share half of the costs of the case of the two districts coming up for trial in the Federal Court in Yakima. Motion seconded by Evett and carried.

(Testimony of R. S. Reiersen.)

There being no other business, the meeting adjourned.

/s/ R. S. REIERSON,
President.

/s/ B. SALVINI,
Director.

/s/ J. H. EVETT,
Director.

Attest:

.....,
Secretary.

1/5/50.

(Whereupon, resolution dated Sept. 28, 1943, was marked petitioner's Exhibit No. 6 for identification.) [52]

Q. (By Mr. Cheadle): I'm now inquiring in regard to identification Number 6.

A. This is a resolution passed by the Board of directors authorizing the payment or advancement of \$750.00 to Moulton & Powell for the payment of necessary expenses in connection with the trial.

Q. What date does it bear?

A. It's dated on the 28th day of September, 1943.

Q. It is a resolution of the District board, is it?

A. Yes, a resolution of the District board.

Mr. Cheadle: We offer in evidence as petitioner's Exhibit Number 6 what's been marked identification 6.

(Testimony of R. S. Reiersen.)

Mr. Ramsey: No objection with the understanding that it's admitted for the purpose of the so-called cost bill.

Mr. Cheadle: We're content to have it admitted, your Honor, for that limited purpose.

The Court: It will be admitted.

(Whereupon, petitioner's Exhibit No. 6 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 6

Resolution

Whereas, the United States has brought action to condemn all the property in the Priest Rapids Irrigation District and the said district is a party thereto and it is necessary to protect the value of the district properties and that said action be contested, and

Whereas, the expenditure of costs is necessary in the proper preparation and trial of the case and the attorneys, Moulton & Powell, should be paid \$750.00 to be used in the necessary expenses of the preparation, trial and appeal and further sums paid as required, now

Therefore, Be It Resolved that the Board of Directors of the Priest Rapids Irrigation District pay Moulton & Powell \$750.00 to be used in the payment of the items above listed, which expenses are recognized to be for a proper District purpose.

(Testimony of R. S. Reiersen.)

Dated at White Bluffs, Washington, this 28th day of September, 1943.

/s/ R. S. REIERSON,
President.

/s/ B. SALVINI,
Director.

/s/ J. H. EVETT,
Director.

Attest:

/s/ JOS. GRELL,
Secretary.

1/5/50.

[Marginal Note]: Write minutes for same.

(Whereupon, minutes of continued meeting held October 18, 1943, was marked petitioner's Exhibit No. 7 for identification.)

(Whereupon, letter to Moulton & Powell dated October 18, 1943, was marked petitioner's Exhibit No. 8 for identification.) [53]

Q. I hand you what's been marked identification number 7, and ask you to state what it is?

A. Minutes of the continued meeting of the 5th of October held at the office of the Priest Rapids Irrigation District, at their office in White Bluffs, October 18, 1943.

Q. I now hand you what has been marked

(Testimony of R. S. Reiersen.)

exhibit for identification number 8, and ask you to state what it is?

A. It's a letter addressed to Moulton & Powell dated on October 18, 1943, signed by the Secretary, J. W. Grell.

Q. Secretary of the——

A. Irrigation District.

Mr. Cheadle: I offer as petitioner's Exhibit Number 7 what's been marked identification 7.

Mr. Ramsey: I don't see the purpose of either of these exhibits; however, if counsel can show what useful purpose they serve I probably wouldn't object to them.

Mr. Cheadle: It will be our position, your Honor, in connection with testimony to come later, that they have bearing on the first contract.

The Court: May I see them, please?

Mr. Cheadle: Number 7 is the only one offered. I will offer number 8 at the same time; they bear on the same matter.

The Court: Well, you've offered them; I think I'll [54] reserve ruling until you do connect them up, since an objection is made to them, at least as to their being relevant here.

(Whereupon, agreement dated October 30, 1943, was marked petitioner's Exhibit No. 9 for identification.)

Q. Handing you, Mr. Reiersen, what's been marked for identification number 9, I ask you to state what it is?

(Testimony of R. S. Reiersen.)

A. That is an agreement entered in on the 30th day of October, 1943, between the Priest Rapids Irrigation District and Moulton & Powell.

Mr. Cheadle: I offer in evidence petitioner's number 9, your Honor, the ruling having been reserved, as I understand it, on 7 and 8.

The Court: Yes, on 7 and 8.

Mr. Ramsey: No objection.

The Court: Number 9 will be admitted, then.

(Whereupon, petitioner's Exhibit No. 9 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 9

This Agreement entered into this 30th day of October, 1943, by and between Priest Rapids Irrigation District, referred to herein as "District" and Moulton & Powell, attorneys at law, referred to herein as "Attorneys," Witnesseth:

District has, pursuant to Resolution heretofore passed by the Board of Directors, employed Moulton & Powell to represent District in all matters in which the District may be interested or concerned in the proceedings brought by the United States for the condemnation of land within the District of which a large area is owned by the District and to represent District in all matters in connection with said proceedings in which the property of the District as a whole, may be involved. As compensation for their services rendered in connection with

(Testimony of R. S. Reiersen.)

said litigation, the sum of \$2000.00 is to be paid at this time. It is further understood by District that in the rendition of said services it has been necessary and will be necessary for Attorneys to incur expenses on behalf of the District in a substantial amount and District now agrees to pay to Attorneys \$750.00 at this time to be used by Attorneys in the payment of expenses necessarily incurred in said litigation and not otherwise.

Attorneys agree to render to District all legal services necessary in the protection of District's interest as a property owner in the District and as the owner of District instrumentalities being taken by the Government and to employ such additional counsel as will be necessary, at their own expense. Attorneys further agree that they will use the aforesaid amount of \$750.00 for the payment of expenses heretofore incurred and to be incurred in handling the litigation referred to herein and not otherwise, and that they will account to District for all expenditures made by them on account of such expenses. Attorneys further agree that they will accept the aforesaid amount of \$2000.00 as full compensation for all services rendered by them as well as services to be rendered by them in connection with said litigation except that in the event that services not heretofore contemplated shall be required of Attorneys, such additional compensation will be paid as the Board of Directors of District may deem proper and not otherwise.

(Testimony of R. S. Reiersen.)

Dated this 30th day of October, 1943.

/s/ R. S. REIERSON,

/s/ B. SALVINI,

/s/ J. H. EVETT,

Directors, Priest Rapids
Irrigation District.

MOULTON & POWELL,

By /s/ M. M. MOULTON.

I, Joseph Grell, Secretary of Priest Rapids Irrigation District, Certify that the foregoing is an executed duplicate contract, the executed original of which is now on file as a part of the records and files of Priest Rapids Irrigation District and is in my custody as Secretary of said District.

[Seal] /s/ JOSEPH GRELL,
Secretary.

1/5/50

(Testimony of R. S. Reiersen.)

(Whereupon, minutes of special meeting held August 23, 1946, was marked petitioner's Exhibit No. 10 for identification.)

Q. I hand you, Mr. Reiersen, what has been marked for identification number 10, and ask you to state what it is?

A. That's the minutes of a special meeting of the board of [55] directors of the Priest Rapids Irrigation District held at 107 South 11th Avenue, Yakima, Washington, August 23, 1946.

Mr. Cheadle: I offer in evidence as Petitioner's Exhibit Number 10 what's been marked identification number 10.

Mr. Ramsey: No objection.

The Court: Admitted.

(Whereupon, petitioned's Exhibit No. 10 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 10

Special Meeting of the Board of Directors of the Priest Rapids Irrigation District Held at 107 So. 11th Avenue, Yakima, Wash., on Aug. 23rd, 1946.

There were present at the meeting:

B. Salvini, President.

J. H. Evett, Director.

Chas. Powell, Attorney.

R. S. Reiersen, Secretary.

(Testimony of R. S. Reiersen.)

The minutes of the previous meeting were read and approved.

The special meeting was called by order of the President of the board. The Directors waived written notice of special meeting.

The Secretary reported that he had received notice from Mr. Spencer owner of the office at 106 No. 2nd St., that the P.R.I. District should move their records from his office. Complying with this request Mr. Salvini and Mr. Reiersen moved the records and equipment to 107 So. 11th Ave., on June 4, 1946.

On Feb. 15, 1946, Mr. Chas. Powell conferred with Mr. Salvini and Mr. Reiersen regarding an action in Benton County Superior Court to compel the County Auditor to issue warrants. Since Mr. Powell was not able to sue County he was authorized to secure the services of J. K. Cheadle.

By motion duly made and passed the above-mentioned acts of the Secretary and President of the board were approved.

A motion made by J. H. Evett and seconded by B. Salvini; that the board enter into a new contract with Moulton and Powell. A copy of contract was read and filed with the Secretary. The motion was passed by unanimous vote.

A motion was made and duly passed ordering the Secretary to set up a budget for 1946, and to transfer any balance remaining in the 1945 Fund to the 1946 Fund.

(Testimony of R. S. Reiersen.)

The following bills were ordered paid:

| | |
|------------------------|---------|
| J. H. Evett | \$13.00 |
| B. Salvini | \$ 5.00 |
| R. S. Reiersen | \$ 9.61 |
| Moulton & Powell | \$45.86 |

Total.....\$73.47

/s/ B. SALVINI,
President.

/s/ J. H. EVETT,
Director.

[Seal] /s/ R. S. REIERSON,
Secretary.

1/5/50

(Whereupon, copy of decree case No. 8035 was marked petitioner's Exhibit No. 11 for identification.)

Q. I hand you, Mr. Reiersen, what's been marked for identification as number 11, and ask you to state what it is?

A. It's an action brought from the Superior Court of the State of Washington, in and for Benton County, No. 8034.

Q. 8034, or 8035?

A. 8035, C. I. Wright and Mamie Wright, husband and wife, versus——

Q. Does it bear a caption indicating what the particular paper is? A. No. 8035, Decree.

(Testimony of R. S. Reiersen.)

Q. Does it have a date indicating the date it was entered?

A. Done in Open Court on the 1st day of August, 1946. [56]

Q. Does it bear a certificate of the clerk of the Benton County court?

A. Dated on the 4th day of January, 1950, Fred D. Kemp, clerk.

Mr. Cheadle: I offer as petitioner's Exhibit number 11 what has been marked as identification number 11.

Mr. Ramsey: No objection.

The Court: It will be admitted.

(Whereupon, petitioner's Exhibit No. 11 for identification was admitted in evidence.)

(Testimony of R. S. Reiersen.)

PETITIONER'S EXHIBIT No. 11

In the Superior Court of the State of Washington,
in and for Benton County

No. 8035

C. I. WRIGHT and MAMIE WRIGHT, husband
and wife, B. SALVINI, J. H. EVETT, and
PRIEST RAPIDS IRRIGATION DIS-
TRICT, a municipal corporation of the State
of Washington,

Plaintiffs,

vs.

HARLEY E. CHAPMAN, County Auditor of
Benton County, Washington, and C. W. NES-
SLY, County Treasurer of Benton County,
Washington,

Defendants.

DECREE

The above-entitled cause having come on for trial on the 12th day of July, 1946, the plaintiffs being represented by their attorney, J. K. Cheadle, and the defendants by their attorney, Andrew Brown; said cause, pursuant to stipulation of counsel, having been consolidated for purposes of trial with the action of Dietrich, et al., v. Chapman, et al., No. 7987; and A. E. Taylor, successor of Harley E. Chapman as County Auditor of Benton County, on motion made in open court and pursuant to consent of his attorney, appearing for him, having been

(Testimony of R. S. Reiersen.)

Petitioner's Exhibit No. 11—(Continued)

substituted for said Harley E. Chapman as a party defendant; and a suggestion of want of jurisdiction of this Court having been presented by the Suggestion of Interest filed herein by the United States of America on May 1, 1946, and an analagous question of jurisdiction having been decided previously in favor of the jurisdiction of this Court by this Court's denial on April 11, 1946, of the motion to quash and dismiss filed in said action No. 7987 by the United States of America under special appearance for that purpose, and the jurisdiction of this Court in the above-entitled cause having been upheld by the denial of the motion for appointment of trustee or receiver and for restraining order filed by the United States of America on May 6, 1946, in the United States District Court for the Eastern District of Washington in *United States v. Alberts, et al.*, Civil No. 128, and denied by the order of said Court entered on June 26, 1946, and this Court having decided on July 12, 1946, in conformance with said prior decisions and contrary to said suggestion, that this Court has jurisdiction, and accordingly having proceeded to trial on the merits; and upon said trial it appearing to the Court, and being so found by the Court, that the facts are as alleged in the complaint and in particular that the defendants, although acting in good faith, have threatened to refuse to issue and pay warrants on the funds of the Priest Rapids Irrigation District on the basis of vouchers approved by the plaintiffs B. Salvini and J. H.

(Testimony of R. S. Reiersen.)

Petitioner's Exhibit No. 11—(Continued)

Evelt; and the court, upon consideration of the facts and the applicable law and being fully advised in the premises, having concluded that the plaintiffs are entitled to a decree granting relief against the defendants and making provisions for further appropriate proceedings;

Now Therefore, it is Hereby Ordered, Adjudged and Decreed: That plaintiffs B. Salvini and J. H. Evelt are de facto directors of the Priest Rapids Irrigation District and that, until further order or decree of this Court as hereinafter provided for, said plaintiffs shall continue to function as directors of said district and in particular shall do any and all things necessary to the defense by said district against the petitioner in the condemnation action of United States of America v. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and necessary to protect otherwise the interests of said district; and that pursuant to vouchers approved by said de facto directors, the County Auditor of Benton County, Washington, shall issue warrants, and the County Treasurer of Benton County, Washington, shall pay said warrants, in the same manner and with the same effect as provided by the laws of the State of Washington with respect to vouchers approved by irrigation district directors.

It is Further Ordered, Adjudged and Decreed that this Court retains jurisdiction of this cause for appropriate supervision of the administration of said irrigation district and for further appropriate

(Testimony of R. S. Reiersen.)

Petitioner's Exhibit No. 11—(Continued)

proceedings directed toward dissolution of said district and distribution of the assets of said district.

It is Further Ordered, Adjudged and Decreed that any award in the condemnation action, United States of America v. Clements P. Alberts, et al., Civil No. 128, which may be ordered by the District Court of the United States for the Eastern District of Washington to be paid to the Priest Rapids Irrigation District, shall upon receipt by said district be paid into this Court, to be paid out upon order of this Court after further appropriate proceedings.

It is Further Ordered, Adjudged and Decreed that within a period of sixty days after final decision in said condemnation action, including final disposition of any appeal or review proceedings therein, said de facto directors shall report to this Court the final decision in said condemnation action and shall suggest, by petition to this Court, such proceedings directed toward dissolution of the Priest Rapids Irrigation District, appointment of trustees and distribution of the assets of said district as shall be deemed by them to be appropriate.

Done in open court this 1st day of August, 1946.

/s/ TIMOTHY A. PAUL,

Judge of the Superior Court.

Presented by:

/s/ J. K. CHEADLE,

Attorney for Plaintiffs.

(Testimony of R. S. Reiersen.)

Petitioner's Exhibit No. 11—(Continued)

Approved as to Form:

/s/ ANDREW BROWN,

Attorney for Defendants.

Filed for record Aug. 8, 1946.

In the Superior Court of the State of
Washington for Benton County

No. 8035

C. I. WRIGHT, et ux., B. SALVINI, J. H. EVETT
and PRIEST RAPIDS IRRIGATION DIS-
TRICT, a Municipal Corporation of the State
of Washington,

Plaintiff,

vs.

HARLEY E. CHAPMAN, County Auditor of
Benton County, Washington, and C. W. NES-
SLY, County Treasurer of Benton County,
Washington,

Defendant.

CERTIFICATE

I, Fred D. Kemp, County Clerk, and by virtue of
the laws of the State of Washington ex-officio Clerk
of the Superior Court of the State of Washington,
in and for said County, do hereby certify that the
annexed and foregoing is a true and correct copy
of the Decree, filed for record August 8, 1946, in

(Testimony of R. S. Reiersen.)

Petitioner's Exhibit No. 11—(Continued)
the above-entitled action, as the same now appears
on file and of record in my office.

In Testimony Whereof, I have hereunto set my
hand and affixed the seal of said Court this 4th day
of January, 1950.

FRED D. KEMP,
Clerk.

[Seal] By /s/ BESS ROYER,
Deputy.

Mr. Cheadle: That concludes the further documentary evidence which we wished to offer.

The Court: All right, you may proceed with your cross-examination.

Cross-Examination

By Mr. Ramsey:

Q. Now, Mr. Reiersen, referring to petitioner's Exhibit 9, being the agreement between the Board and Moulton & Powell entered into on the 30th day of October, 1943, "District has, pursuant to resolution heretofore passed by the board of directors, employed Moulton & Powell to represent District in all matters in which the District may be interested or concerned in the proceedings brought by the United States for the condemnation of land within the District of which a large area is owned by the District and to represent District in all matters in connection with said proceedings in which the prop-

(Testimony of R. S. Reiersen.)

erty of the District [57] as a whole, may be involved. As compensation for their services rendered in connection with said litigation, the sum of \$2000.00 is to be paid at this time. It is further understood by District that in the rendition of said services it has been necessary and will be necessary for attorneys to incur expenses on behalf of the District in a substantial amount and District now agrees to pay to attorneys \$750.00 at this time to be used by attorneys in the payment of expenses necessarily incurred in said litigation and not otherwise. Attorneys agree to render to District all legal services necessary in the protection of District's interest as a property owner in the District and as the owner of District instrumentalities being taken by the government and to employ such additional counsel as will be necessary, at their own expense. Attorneys further agree that they will use the aforesaid amount of \$750.00 for the payment of expenses heretofore incurred and to be incurred in handling the litigation referred to herein and not otherwise, and that they will account to District for all expenditures made by them on account of such expenses. Attorneys further agree that they will accept the aforesaid amount of \$2000.00 as full compensation for all services rendered by them as well as services to be rendered by them in connection with said litigation except that in the event that services not heretofore [58] contemplated shall be required of attorneys, such additional compensation will be paid as the board of directors of District may deem

(Testimony of R. S. Reiersen.)

proper and not otherwise.” Now, this contract was entered into with Moulton & Powell on the 30th of October, 1943, wasn’t it? A. That’s right.

Q. And it was the intent of the District at that time to employ Moulton & Powell as its attorneys to handle all of its litigation growing out of the condemnation case entitled United States vs. Clements P. Alberts, civil number 128, in this Court?

Mr. Cheadle: May I have the question read back?

(Whereupon, the reporter read the pending question.)

The Court: Did you understand the question?

A. Yes. The answer is yes.

Q. The answer was yes. Now, under this contract Moulton & Powell agreed to do this work and to employ such other counsel as might be necessary for the sums paid, unless the district at its option should later feel that they should pay an additional amount, is that correct, for unexpected work that might develop?

A. Up to a certain time, yes.

Q. Well, there’s no time limit set in your contract here, if you’d like to look at it.

A. We thought it preliminary, up until condemnation time. [59]

Q. I hand you petitioner’s Exhibit 9, and ask you to look at it and see if you find any such limitation.

(Testimony of R. S. Reiersen.)

A. It doesn't provide in here, no. I'm referring to a preliminary resolution stating that——

Q. Well, let's stay off the resolution. This contract will have to stand by itself.

Mr. Cheadle: Your Honor, if counsel will permit, he now suggests that the contract will have to speak for itself, however, counsel himself has been interrogating this witness outside the terms of the contract. Counsel can let the documents speak for themselves, or can ask questions going outside the contract——

The Court: I think we can decide those legal questions when we get to them. Proceed.

Q. (By Mr. Ramsey): Now, what consideration was there for the entering into of this contract of the 30th day of August, 1946, other than that recited in the second paragraph of the contract? And before you answer the question, I'll read you that paragraph: "Whereas, an action is now pending in the United States District Court for the Eastern District of Washington, Southern Division, involving condemnation of property of the District, and Moulton & Powell have been heretofore employed to protect the interests of the District, and certain payments have been made to them under said contract; and whereas it has [60] developed that said litigation is much more involved and the likelihood of appeal is much greater than initially contemplated"; was there any consideration on the part of the District for the entering into of this

(Testimony of R. S. Reiersen.)

contract other than the consideration for the original contract?

Mr. Cheadle: If your Honor please, I object. The question calls for legal conclusion of the witness.

Mr. Ramsey: I don't think so; I think it calls for a factual answer.

The Court: I'll overrule the objection; you've asked if there was any consideration other than that stated——

A. May I ask if that's the second——

Q. I hand you now petitioner's Exhibit 1. That would be this paragraph here.

A. Now, I get your question on that——

Q. Do you understand the question?

A. There was a great deal of litigation involved.

The Court: Perhaps you'd better read the question to the witness.

(Whereupon, the reporter read the question as follows: "Was there any consideration on the part of the District for the entering into of this contract other than the consideration for the original contract?")

A. Well, the consideration is stated there, the amount of [61] \$2,000.00.

Q. No, I don't believe you understand me. I'll rephrase the question. You had hired Moulton & Powell to represent the District in this condemnation proceeding?

A. Yes.

Q. You had paid them \$2,000.00 and advanced

(Testimony of R. S. Reiersen.)

\$750.00 in costs. Under that contract they agreed to do all of the work, legal work that might be necessary for the District and to employ any other associate counsel that might be necessary for that fee as paid to them, unless as stated in the final paragraph of the contract of October 30, 1943, "except that in the event that services not heretofore contemplated shall be required of attorneys, such additional compensation will be paid as the Board of Directors of District may deem proper and not otherwise." Now you come along in August 30 of 1946 and enter into this second contract whereby you agree to pay them certain contingent attorney fees which now amount to nearly \$79,000.00. What consideration was there for entering into this second contract on the part of the District?

A. There was a great deal of work involved and coming up that required attorneys' services for probably a long time. We had to take that into consideration.

Q. You had hired Moulton & Powell to take care of that very work, hadn't you? [62]

A. Up to——

Q. Now just a minute; you're trying to vary the terms of your own contract here. There's no time limit set in your contract.

Mr. Cheadle: Again, your Honor, I object to counsel asking the witness questions and then seeking to brow-beat him with the contract.

Mr. Ramsey: I'm not trying to brow-beat; I'm

(Testimony of R. S. Reiersen.)

just trying to find out what the consideration is for giving these men \$79,000.00.

Mr. Cheadle: He's sworn to tell the truth; let him tell the truth.

The Court: I'll ask the witness to state in his own words what he thinks it was, then if the Court feels the contract must be considered in its own words, I will do that.

A. It was our understanding that the first contract covered the litigations involved in the first case when we were attempting to determine the value of the irrigation assets to the various properties in the district.

Q. Well, now——

A. And up to that time, and that when it came to condemnation, a new contract would be on a contingent basis.

Q. Now, then, you speak of this first case. Are you referring now to the cases involving Wright and Parks, and was it [63] Deitrich, the first group of individually owned tracts that was tried before this court?

A. Those cases, yes, were selected as representative.

Q. Was it the intention of the District to hire an attorney and pay an attorney to handle the cases of these individual landowners?

A. It was, yes.

Q. Just what did the District expect to get out of it?

A. We wanted to find out, the Board of Direc-

(Testimony of R. S. Reiersen.)

tors at that time felt that we should learn something, find out what the value of the non-irrigated assets were to the land in the District. We felt that it wasn't properly appraised.

Q. Well, now, just a minute. If any additional value had been added to the lands of these individual property owners by showing the value of the assets of the District, that would have gone to the individual property owners, not to the District, wouldn't it?

Mr. Cheadle: Your Honor, I strongly object to counsel presenting legally argumentative questions to this witness. They are precisely the same type as the government has presented to the courts throughout protracted litigation, and even to the Court of Appeals, and I submit that certainly this question calls for a legal conclusion; at any rate, government counsel has been contending throughout the years re the answer to that, and he contends [64] it is a legal conclusion.

Mr. Ramsey: I am intrigued that the witness knows what he's talking about, the District went out and hired attorneys for the individual land owners and paid them out of District funds.

The Court: Well, I'll overrule the objection.

Mr. Ramsey: Would you read that question, please?

(Whereupon, the reporter read the pending question.)

A. We felt—personally I felt that that was——

Q. Now, just a moment——

(Testimony of R. S. Reiersen.)

The Court: I think he should be permitted to answer in his own way, Mr. Ramsey. What did you start to say?

A. That was a question that we were trying to find out, and it had to be determined. We didn't know.

Q. Well, what was the interest of the District in it, one way or the other?

A. We were interested in getting full value. We were representing the farmers, the board of directors were elected to serve the district.

Q. Well, did you hire the attorneys to represent all of the land owners in that District?

A. No, the District.

Q. Pardon?

A. To represent the District.

Q. But in this particular case you think you expended \$2700.00 [65] of District funds in order to furnish attorneys to some private land owners to determine a question that didn't mean one dime one way or another to the District as a District?

A. That wasn't our idea of it.

Q. Well, as a matter of fact, did the District stand to gain one dollar whichever way that question went, the District itself?

A. It added values to the lands.

Q. Well, those lands didn't belong to the District, did they?

A. Well, they owned certain lands.

Q. Yes, and it settled for them, so it wasn't an issue at all. I think that's all.

(Testimony of R. S. Reiersen.)

Redirect Examination

By Mr. Cheadle:

Q. Mr. Reiersen, on cross-examination counsel stated that he was intrigued about the District paying attorneys' fees with regard to the trials of these individual farms. Were or were those not test cases?

A. They were test cases representative of three classifications of land.

Q. Did or did not——

Mr. Ramsey: Now, if the Court please, I'm going to object to counsel going any further on developing this theory. If that was the purpose of the hiring of these attorneys, if that was what they were paid the money for, [66] then certainly their contract doesn't so state; in fact, it states positively the opposite; they're hired to represent the District in the matters arising in which the District was interested. Now I hardly think counsel should at this late date attempt to substitute for the contract a totally different understanding.

Mr. Cheadle: Your Honor, and again we are met by government counsel playing both ends against the middle. The government has contended that District properties were fully paid for in the awards made to individual farmers, and as the record will show, this three volume record on appeal, early in 1943 counsel for the Irrigation District did file a motion regarding sequence of trial, proposing that there be a separate trial regarding

(Testimony of R. S. Reiersen.)

the District's own properties. Likewise will the printed record show in the reported words of Judge Schwellenbach in proceedings had in April of 1944, Judge Schwellenbach stated that it had been agreed, and he stated this further in his memorandum opinion of June 21, 1945, that it had been agreed in the summer of 1943 in what if this had been governed by Federal rules would have been deemed a pretrial conference, that there would be test cases selected at which time this novel and unique legal question, this novel and unique contention of the government, would be presented to the Court by way of offers of proof, and that Judge [67] Schwellenbach would overrule those offers of proof and appeals would be taken, and thus would be settled in that manner the question of compensation for the District owned properties. Those trials were held, as the printed record shows, in early October, and these minutes, your Honor, which we have introduced, in June 10, 1943, and later, in September, provided \$2,000.00 to Moulton & Powell for preparing a brief to be handed to Judge Schwellenbach at the same time the government would hand their brief, and it says further expenses would be required, and in the minutes of the September, 1943, meeting at which the Board authorized the \$750.00 they made an express finding in the last sentence that these are deemed expenses in the District's interests. They also hired Lloyd Wiehl, as is shown by one of those land owners' cases, yet here comes

(Testimony of R. S. Reiersen.)

government counsel and says, "No, that isn't the situation."

The Court: I'm going to overrule the objection and hear the testimony and decide later what construction is to be put upon the contract, whether it should be construed as it appears to read, or in some other way. Has he answered the last question?

(Whereupon, the reporter read the last complete question and answer.)

Q. (By Mr. Cheadle): To your knowledge did the District or did [68] the District not pay any District funds for employment of any counsel with regard to any individual land owners other than those test cases tried in early October of 1943?

A. No.

Q. Mr. Reiersen, you have identified the minutes of June 10, 1943, being exhibit number 4, the second paragraph of which reads: "A discussion of ways and means of paying the attorney fees to Moulton & Powell was discussed and it was decided that it would be agreeable to both the District and the attorneys to make a payment of \$1000.00 in cash and a payment of \$1000.00 in district warrants. The total amount of \$2000.00 being the amount required by Moulton & Powell to prepare the legal requirements of the District up to the time of condemnation proceeding, should such a step become necessary." I hand you again exhibit 4 which you may look at further if you care to, to refresh your mem-

(Testimony of R. S. Reiersen.)

ory. Was that the same \$2000.00 recited in the October contract?

A. That's the same \$2000.00, yes.

Q. Handing you what has been admitted as petitioner's exhibit 9, I'll ask you to refer to one of the middle paragraphs where reference is made to the District's agreeing in addition to pay \$750.00, and ask you to read that and refresh your memory, and then I hand you also petitioner's exhibit number 6, being the resolution of the Board of [69] Directors of September 28, 1943, and I ask you whether the \$750.00 referred to is the same? A. That is.

Q. Do you know of your own knowledge, Mr. Reiersen, whether the \$2000.00 to Moulton & Powell and the \$750.00 was or was not in fact paid by issuance of district warrants before October 30?

A. Yes, they were issued before.

Q. Were they not issued, in fact, on October 19?

A. Yes.

Q. And was not October 19 the same date—I beg pardon, was that not one day after the meeting at which the District board decided to accept Judge Schwellenbach's ruling so far as trying the issue out in those test cases was concerned?

A. The day before, yes.

Q. The day before, or day after?

A. Immediately following.

Q. Is it correct, Mr. Reiersen, that the October 30 contract was a reducing to writing of the agreement reached with Moulton & Powell on June 10, 1943, and as reflected in the minutes of the Board's

(Testimony of R. S. Reiersen.)

meeting of June 10, 1943? A. That is right.

Q. Did the District know what the situation was as to further litigation after Judge Schwollenbach's rulings in those [70] October trials?

A. No, we didn't know. The declaration of taking wasn't issued until 1944, sometime in April or May, and we had no knowledge of what proceedings would take place, at the time that we made this first contract.

Mr. Cheadle: That's all.

The Court: Any further questions?

Mr. Ramsey: No.

(Whereupon, the witness was excused.)

The Court: I think it's becoming apparent that we will not be able to finish this matter this afternoon. I didn't know we were going to relitigate the 1943 cases in this matter, but it is, I appreciate, of substantial importance to the attorneys here in this controversy, and I'm not inclined to try to hurry it through now. I thought if you have any attorneys here who would like to get away, and you wish to put them on out of order, then I'll adjourn until tomorrow morning, that is, adjourn this case.

Mr. Cheadle: We will, then, at this time, your Honor, at the suggestion of the Court, have Mr. Harold Shefelman take the stand.

HAROLD SHEFELMAN

called as a witness on behalf of the petitioning attorneys, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cheadle:

Q. Will you state your name to the reporter?

A. Harold Shefelman.

Q. What is your occupation, Mr. Shefelman?

A. A lawyer.

Q. Where are you located?

A. In Seattle.

Q. How long have you been in practice there, Mr. Shefelman?

A. Since the summer of 1925.

Q. Does or does not your practice include work in municipal corporation law? A. It does.

Q. Would you state to the Court some indication of the percentage of your practice which involves municipal corporation law, approximate, of course?

A. Oh, I would just take a rough guess and say 20 per cent of my time.

Q. Have you been engaged frequently in litigation representing various and sundry sorts of municipal corporations of the state of Washington?

A. I have.

Q. So as to expedite, your Honor, I will ask a very brief question and let the witness relate, will you state to the Court so that the reporter may take it down the positions you have had in the American Bar Association, please?

(Testimony of Harold Shefelman.)

A. Well, I'm a member of the House of Delegates of the American Bar—I feel rather foolish—I've been a member [72] of the House of Delegates of the American Bar Association, a member of the Council of the section on Legal Education, am presently a member of the Council of Ten of the Section on Municipal Law, which operates the affairs of the Municipal Law Section.

Q. Have you not also been president of the Seattle Bar Association? A. I have.

Q. I hand you, Mr. Shefelman, petitioner's exhibit number 1.

A. Yes, I have seen this instrument before.

Q. You have examined that contract?

A. Yes, I have.

Q. At the request of Moulton & Powell and J. K. Cheadle? A. I have, sir.

Q. Will you please state to the Court your opinion whether that contract provides an unconscionable or unreasonable percentage of recovery as an attorneys' fee in the contingent event of recovery?

A. It certainly does not.

The Court: May I ask this question: Are you familiar in a general way, Mr. Shefelman, with the litigation that was contemplated when this contract was executed?

A. I might say, sir, that I have read through the District's brief in the Circuit Court of Appeals, which has an excellent statement of the facts, I judge; I have read [73] their affidavit detailing the work done, filed with this Court; I have read the

(Testimony of Harold Shefelman.)

authorities pro and con; I have really spent quite a few hours checking the record, and I have glanced through the record on appeal also.

The Court: I see; that's the only question I have to ask.

Q. (By Mr. Cheadle): Would you state to the Court whether in your opinion, in view of the character of this litigation, with a contingent fee contract being made before trial, whether the contingent compensation could have been somewhat higher than that provided in that contract and still have been reasonable?

A. Yes, I will answer in the affirmative and say that it could have been, and that in my judgment the fee arrangement set forth in this contract was a very reasonable arrangement.

Mr. Cheadle: Your Honor, I merely want to mention that in Mr. Shefelman's response to one of the Court's questions he stated he had examined an affidavit which he stated had been filed. I did send an executed affidavit, executed by myself, to Mr. Shefelman for his information; I have not filed it because I am here and prepared to testify; however, he has examined my sworn statement of the work we did.

A. I assumed it had been filed. [74]

The Court: It's one you furnished to him?

Mr. Cheadle: Correct. You may inquire.

Mr. Ramsey: No questions.

(Whereupon, the witness was excused.)

The Court: Do you have any other value witnesses or experts to wish to put on?

Mr. Cheadle: Yes, we have, your Honor; two others. They are from Yakima.

The Court: Well, I had in mind that unless it would seriously inconvenience them, I'd prefer to have it go over until morning, because I have three other matters to hear tonight, and it will run me rather late as it is. I think we should resume, however, at 9:30 in the morning, so I'll suspend this case until 9:30 and the court will take a five minute recess before proceeding.

(Whereupon, the Court took a recess in this case until Friday, January 6, 1950 at 9:30 a.m.)

January 6, 1950, 9:30 o'Clock A.M.

(All parties present and represented as before, and the hearing was resumed.)

The Court: Before we proceed, gentlemen, I feel that I may have been responsible for having the petitioners bring in all these expert witnesses, the lawyers here, because I indicated in a conference in chambers that it [75] might be well to have such supporting testimony. I wonder if we couldn't shorten this by stipulating that your other lawyers here would testify, in effect, as Mr. Shefelman did, if called. It doesn't seem to me there could be much question, on the basis where these lawyers testify, that is, under ordinary circumstances where there are normal relations between the parties, and no prior contract between them, there could be no question in my mind but what this

is a reasonable contingent fee contract considering the complex legal problems involved. I assume in a statement of the stipulation you could show who the laweyrs are and in a general way the length of time they have been practicing and any positions in the bar associations that they have held. Do you think that that might be done?

Mr. Ramsey: Yes.

The Court: I think it might be fair to ask Mr. Ramsey at this time if he proposes to call any experts to testify that the contract is not a reasonable fee contract?

Mr. Ramsey: Yes, your Honor; well, let me put it this way: I do expect to call two experts to testify that in view of the earlier contract, that this is not a fair contract nor a reasonable contract.

The Court: Well, I'm just making the suggestion, gentlemen; you can do as you see fit about it.

Mr. Cheadle: We will so stipulate, your Honor. We [76] will assume, of course, that in the event it seems appropriate, we could on rebuttal if it appeared necessary then call our witnesses.

The Court: Yes, if the government brings in experts I certainly would permit you to bring experts in in rebuttal, if you care to do so, to testify in person.

Mr. Cheadle: I can state the stipulation in open court here to the reporter, and then if it's satisfactory in form to Mr. Ramsey he can agree to it.

The Court: Yes, I think that could be done, to save time.

Mr. Cheadle: At the suggestion of the Court the

petitioners stipulate that John Gavin, attorney of Yakima, Washington, a member of the Board of Governors of the Washington State Bar Association, and that V. O. Nichoson, attorney of Yakima, and president of the Washington State Bar Association, would if they were called upon to testify, testify to the same effect as did the witness for petitioners in yesterday's hearing, Mr. Harold Shefelman. If I may add, your Honor, to the statement, Judge Nichoson, V. O. Nichoson, we want the stipulation to show was on the bench for eight years and has practiced in Yakima since 1908.

The Court: Judge Nichoson was judge of the Superior Court of the State of Washington for Yakima County, is [77] that correct?

Mr. Cheadle: The Superior Court of the State of Washington for Yakima County.

The Court: Is that acceptable to you, Mr. Ramsey?

Mr. Ramsey: Yes.

The Court: All right, the Court will approve the stipulation as dictated into the record. You may proceed, then.

Mr. Cheadle: Your Honor, may I inquire if it is the desire of the Court that Mr. Powell and I take the stand and testify as to the work done here in this matter? I may state to the Court we had planned to do that this morning prior to putting on the testimony of Mr. Gavin and Mr. Nichoson, with a view to having before them a more elaborate statement of the work done in this case and the character of the proceedings, before they gave their

opinion testimony. That would have normally been done likewise with regard to Mr. Shefelman's testimony, and it was only due to the turn the proceedings took yesterday and Mr. Shefelman's desire to return to Seattle if at all possible that we put him on prior to Mr. Powell and I giving that testimony. In view of the stipulation I am wondering whether your Honor cares at this time, at any rate, to have such testimony from Mr. Powell and me?

The Court: Well, as I understand it, the purpose of [78] your proof is to show that this was a reasonable fee on a contingent contract basis; in other words, you're not attempting to prove the reasonableness of the fee on a quantum merit basis in the absence of any contract.

Mr. Cheadle: That is correct, your Honor, we are not.

The Court: It would seem to me that the test of whether or not a contingent fee contract is reasonable would be the services in reasonable contemplation at the time of the execution of the contract rather than the work that was actually done, but so far as I am concerned I am fairly well acquainted, I think, with the work you gentlemen did, and I wouldn't require any testimony, but if you wish to complete your record by putting it in the record, I wouldn't want to stand in your way of doing that, of course.

Mr. Cheadle: We will put Mr. Powell on for some testimony, your Honor. We may complete the record with some documentary testimony.

CHARLES L. POWELL

called as a witness on behalf of the petitioning attorneys, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cheadle:

Q. State your name to the reporter, please?

A. Charles L. Powell.

Q. You are one of the petitioners in this petition for payment [79] of attorneys' fees?

A. Correct.

Q. And you have been since this condemnation action was filed one of counsel for the Priest Rapids Irrigation District?

A. Yes.

(Whereupon, certified copies of financial statements of Priest Rapids Irrigation District were marked petitioner's Exhibit No. 12 for identification.)

Q. I hand you, Mr. Powell, a group of sheets, each of them being on the same printed form, but having blanks filled in in pencilled figures, and ask you to identify them further.

A. The identification 12 consists of certified copies of financial statements of the Priest Rapids Irrigation District, that is, monthly financial statements for months ending February 28, 1943, to December 31, 1944, inclusive, showing the outstanding indebtedness and the payment of the indebtedness during each month.

Q. Have you examined these sheets?

(Testimony of Charles L. Powell.)

A. Yes, I have.

Q. Were they obtained from the county treasurer under his seal at your request? A. Yes.

Mr. Cheadle: We offer these in evidence as petitioner's Exhibit Number 12. [80]

Mr. Ramsey: May I ask what the purpose of the exhibit is?

Mr. Cheadle: The purpose is——

The Court: I suppose to show—pardon me, go ahead, you may state it.

Mr. Cheadle: The purpose of the exhibit is to show that the financial condition of the Priest Rapids Irrigation District at the outset of this litigation, particularly in the latter part of 1943, was such that any arrangement it might have with counsel had to be contingent. These sheets also show, your Honor, that after the United States took the properties—in other words, they show that at the latter part of 1943 some \$11,000.00 was paid by the Priest Rapids Irrigation District in redemption of \$8,000.00 of bonds and some \$3,000.00 of interest on bonds, and show further that in the year of 1944 interest on bonds in the approximate amount of two or three thousand dollars was paid by the Priest Rapids. In other words, Priest Rapids District funds were very substantially exhausted after the government moved in, due to the fact that the Priest Rapids District continued even after it had lost physical possession of the properties to pay its bonded indebtedness and interest thereon, and we think that of course has bearing on the other peti-

(Testimony of Charles L. Powell.)

tion yet to be heard regarding the District's expenses, and we feel that it also has some [81] bearing on the matter of this attorneys' fee, particularly in view of objections which we have only by way of government counsel's brief.

The Court: Do you object to the document, Mr. Ramsey?

Mr. Ramsey: If the document is offered for the purpose of showing the financial condition of the District and the necessity for a contingent fee contract, there is no objection.

The Court: Well, I understand that was the purpose of it.

Mr. Cheadle: Yes.

The Court: Admitted.

(Whereupon, petitioner's Exhibit No. 12 for identification was admitted in evidence.)

(Whereupon, three vouchers were marked petitioner's Exhibit No. 13 for identification.)

Q. (By Mr. Cheadle): I hand you, Mr. Powell, three sheets which have been marked identification number 13, and ask you to identify them.

A. Identification 13 consists of three sheets, being duplicate originals of vouchers of the Priest Rapids Irrigation District, two dated June 12, 1943, and one dated September 29, 1943.

Q. Would you state the amounts of those dated June 12, I [82] believe you said, 1943?

A. Each one of the two vouchers dated June 12,

(Testimony of Charles L. Powell.)

1943, are for \$1,000.00, signed by M. M. Moulton, and recite on the body of the voucher the purpose for which the payment was requested.

Q. And the middle one for \$750.00 bears what date?

A. September 29, 1943, being for \$750.00 advance on expenses as per resolution.

Mr. Cheadle: We offer identification 13 as petitioner's Exhibit 13.

Mr. Ramsey: May I ask the purpose of this identification?

Mr. Cheadle: The purpose of this identification, your Honor, is to show that the \$2,000.00 paid to Moulton & Powell and the \$750.00 paid to Moulton and Powell, both of which have been discussed at considerable length in government's brief, were in fact paid, the \$2,000.00 by vouchers drawn June 12, 1943, just two days after that resolution of June 10, and that the \$750.00 expense voucher was drawn in September approximately at the same time as that resolution, and that those are the payments referred to in that first contract.

The Court: They're connected up with this contract which is in evidence?

Mr. Cheadle: They are definitely connected up with that first contract. [83]

The Court: It seems to me they're admissible, unless there's objection.

Mr. Ramsey: Well, I haven't any objection, if they're in issue, for certainly they were issued and they were paid.

(Testimony of Charles L. Powell.)

The Court: It will be admitted.

(Whereupon, petitioner's Exhibit No. 13 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 13

County of Benton

Irrigation District Voucher

Claim No.

Warrant No.

Priest Rapids Irrigation District

White Bluffs, Washington

\$1000.00 To Moulton & Powell, Dr.

.....Fund P. O. Address Kennewick, Wash.

Retainer fee for employment in United States of America, Plaintiff vs. Clements Alberts, Defendant to represent District's interests in all matters arising in connection with the acquisition of District's property by the United States in said proceeding, said amount to be in part payment of said retainer fee.....\$1000.00

State of Washington,
County of Benton—ss.

I, M. M. Moulton, having been first duly sworn on oath, do hereby depose and say that I am a member of the claimant named in the attached bill; that no officer or employee of the Priest Rapids Irrigation District is in any manner beneficially inter-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 13—(Continued)

ested, directly or indirectly, in the claimant or claim hereto attached; that the said claim of \$1000.00 is true and correct; that the services or materials therein mentioned were actually rendered or furnished as therein charged by the person, firm or corporation therein mentioned and not otherwise; that the materials furnished are charged at the lowest price at the time of purchase; that no rebate of any character, kind or description, or any promise of such, has been made to any person or persons whomsoever; and said claim, or any part thereof has not been paid.

/s/ M. M. MOULTON,
Claimant.

Subscribed and sworn to before me this 12th day of June, A.D. 1943.

[Seal] /s/ HAROLD G. FYFE,
Secretary.

The County Auditor is hereby authorized, for and on behalf of the undersigned, to present for payment any warrant issued pursuant to this voucher.

.....,
Claimant.

We hereby approve the above voucher:

/s/ R. S. REIERSON,
/s/ B. SALVINI,
/s/ J. H. EVETT,
Directors.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 13—(Continued)

/s/ JOS. W. GRELL,
Secretary.

County of Benton
Irrigation District Voucher

Claim No.

Warrant No.

Priest Rapids Irrigation District
White Bluffs, Washington

\$750.00 To Moulton & Powell, Dr.

1943 Expense Fund

P. O. Address Kennewick, Wash.

To advance on necessary expenses, legal
preparation and presentation of defense
in U. S. vs. Alberts, as per resolution.....\$750.00

State of Washington,
County of Benton—ss.

I, Charles L. Powell, having been first duly sworn on oath, do hereby depose and say that I am partner of the claimant named in the attached bill; that no officer or employee of the Priest Rapids Irrigation District is in any manner beneficially interested, directly or indirectly, in the claimant or claim hereto attached; that the said claim of \$750.00 is true and correct; that the services or materials therein mentioned were actually rendered or furnished as therein charged by the person, firm or corporation therein mentioned and not otherwise;

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 13—(Continued)

that the materials furnished are charged at the lowest price at the time of purchase; that no rebate of any character, kind or description, or any promise of such, has been made to any person or persons whomsoever; and said claim, or any part thereof has not been paid.

/s/ CHARLES L. POWELL,
Claimant.

Subscribed and sworn to before me this 29th day of September, A.D. 1943.

/s/ JOS. W. GRELL,
Secretary.

The County Auditor is hereby authorized, for and on behalf of the undersigned, to present for payment any warrant issued pursuant to this voucher.

.....,
Claimant.

We hereby approve the above voucher:

/s/ R. S. REIERSON,

/s/ B. SALVINI,

/s/ J. H. EVETT,
Directors.

/s/ JOS. W. GRELL,
Secretary.

(Testimony of Charles L. Powell.)
Petitioner's Exhibit No. 13—(Continued)
County of Benton

Irrigation District Voucher
Claim No. Warrant No.

Priest Rapids Irrigation District
White Bluffs, Washington
\$1000.00 To Moulton & Powell, Dr.
. Fund P. O. Address Kennewick, Wash.

Retainer fee for employment in United States of America, Plaintiff vs. Clements Alberts, Defendant, to represent District's interests in all matters arising in connection with the acquisition of District property by the United States in said proceeding, said amount to be in part payment of such retainer fee. \$1000.00

State of Washington,
County of Benton—ss.

I, M. M. Moulton, having been first duly sworn on oath, do hereby depose and say that I am a member of the claimant named in the attached bill; that no officer or employee of the Priest Rapids Irrigation District is in any manner beneficially interested, directly or indirectly, in the claimant or claim hereto attached; that the said claim of \$1000.00 is true and correct; that the services or materials therein mentioned were actually rendered or furnished as therein charged by the person, firm or corporation therein mentioned and not otherwise;

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 13—(Continued)

that the materials furnished are charged at the lowest price at the time of purchase; that no rebate of any character, kind or description, or any promise of such, has been made to any person or persons whomsoever; and said claim, or any part thereof has not been paid.

/s/ M. M. MOULTON,
Claimant.

Subscribed and sworn to before me this 12th day of June, A.D. 1943.

[Seal]: /s/ HAROLD G. FYFE,
Notary Public.

The County Auditor is hereby authorized, for and on behalf of the undersigned, to present for payment any warrant issued pursuant to this voucher.

/s/ M. M. MOULTON,
Claimant.

We hereby approve the above voucher:

/s/ R. S. REIERSON,

/s/ B. SALVINI,

/s/ J. H. EVETT,
Directors.

/s/ JOS. W. GRELL,
Secretary.

(Testimony of Charles L. Powell.)

Mr. Cheadle: Mr. Reiersen testified yesterday that the vouchers were paid by the county treasurer about the middle of October, 1943, approximately October 19, 1943. These are the dates of issuance to the payees.

(Whereupon, copy of petition in case of Wright vs. Chapman, No. 8035, was marked Petitioner's Exhibit No. 14 for identification.)

Q. I hand to you, Mr. Powell, what's been marked identification number 14, and ask you to identify it.

A. Identification 14 is a certified copy and also, incidentally, an executed duplicate original of the petition for further proceedings in cause number 8035 in Benton County, Washington, in the Superior Court, being the dissolution proceedings there pending brought by the Priest Rapids Irrigation District in 1946.

Mr. Ramsey: Objected to as being incompetent, irrelevant and immaterial. [84]

Mr. Cheadle: Certainly it is not incompetent, your Honor, being a certified copy; as to being irrelevant and immaterial, it, together with the next two documents which we will offer in evidence, have bearing on the position and contention taken by the government in its brief. We are confronted in this hearing on this petition, your Honor, with the peculiar situation of having filed a petition, but not having had any responsive pleading

(Testimony of Charles L. Powell.)

of any character filed by the government. We are advised of the government's position only by what is set forth in the brief which was served just on Tuesday in Kennewick on Moulton & Powell, and we offer these as having bearing on the position of the government as set forth in its brief.

The Court: Which point does it refer to? Which does it have particular bearing on?

Mr. Cheadle: It has bearing on the first point made in the government's brief, namely, that all of this money is the property of the United States, that the United States is the only party having any interest in this condemnation award, and that therefore no payment of any attorneys' fees should be allowed to the District.

The Court: Is it your position that you wish to show that dissolution proceedings have been instituted and are pending in state court, so that it has not yet been determined by the state court who will be the beneficiary? [85]

Mr. Cheadle: That is correct, your Honor, and in the further two exhibits we will offer it will be shown that the government, although in this condemnation proceeding the government has regularly contended that on the government's interpretation of the Horse Heaven case there follows the government's conclusions, as to the situation, yet the government has now in a separate proceeding in Benton County filed a petition, a complaint and a petition for dissolution in which the government

(Testimony of Charles L. Powell.)

now alleges in Benton County that none of the laws of the state of Washington regarding dissolution of irrigation districts has any bearing on the situation of the Priest Rapids Irrigation District, and, of course, the Horse Heaven case, as your Honor knows, was one in which there was interpreted a statute re dissolution of irrigation districts. The government is now in Benton County taking a position contrary to the position being taken by government in its brief here.

The Court: I'll overrule the objection.

Mr. Ramsey: I object to counsel stating what government's position is.

Mr. Cheadle: I have stated what we consider the position of the government will be shown by these documents. We offer these as the best evidence of what the government's position is. [86]

The Court: I don't think we need to get into any argument as to what the government's position is. Mr. Ramsey is the only one who could state that officially in these proceedings, I presume. I think, though, these documents should be admitted in order to show what proceedings are pending in state court.

Mr. Cheadle: I might add they will also have some bearing on the petition of the District for payment of its \$2805 expenses.

The Court: I think you are also contending, do you not, that the District needs the money in addition to that required to pay off the outstanding

(Testimony of Charles L. Powell.)

certificates of indebtedness, to carry on this litigation?

Mr. Cheadle: That is correct, your Honor, so the showing of what is pending there I think does support the petition.

The Court: I'll overrule the objection and admit identification 14. We're only dealing with them one at a time, of course.

(Whereupon, petitioner's Exhibit No. 14 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 14

In the Superior Court of the State of Washington,
in and for the County of Benton

No. 8035

C. I. WRIGHT and MAMIE WRIGHT, Husband
and Wife, B. SALVINI, J. H. EVETT and
PRIEST RAPIDS IRRIGATION DIS-
TRICT, a Municipal Corporation of the State
of Washington,

Plaintiffs,

vs.

HARLEY E. CHAPMAN, County Auditor of
Benton County Washington, and C. W. NES-
SLY, County Treasurer of Benton County,
Washington,

Defendants.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

PETITION OF B. SALVINI AND J. H. EVETT,
DE FACTO DIRECTORS OF THE PRIEST
RAPIDS IRRIGATION DISTRICT, A
MUNICIPAL CORPORATION OF THE
STATE OF WASHINGTON

Re

FURTHER PROCEEDINGS

Come now petitioners, B. Salvini and J. H. Evett, pursuant to and in accordance with the decree of this Court, entered in the above-entitled cause on August 1, 1946, and to this Court report, suggest and petition as follows:

I.

In accordance with this Court's decree entered in the above-entitled cause on August 1, 1946, ordering petitioners, the de facto directors of the Priest Rapids Irrigation District, to continue to function as directors of said district and in particular to do any and all things necessary to the defense by said district in the condemnation action of United States of America v. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and to protect otherwise the interests of said district, the petitioners, B. Salvini and J. H. Evett, have continued to function as directors of the Priest Rapids Irrigation District and have done all things necessary to the defense of said district in said condemnation action.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

II.

Said condemnation action came on for trial before said United States District Court on February 10, 1947, and on February 20, 1947, the jury rendered its verdict. The jury found that the just compensation to be paid for the taking of that portion of the properties of the Priest Rapids Irrigation District, not devoted and applied to irrigation purposes, was \$473,356. In answer to a special interrogatory, the jury found that the value of that part and portion of the properties of said district, devoted and applied to irrigation purposes, was \$365,847. The said District Court's judgment on the verdict gave judgment in the sum of \$473,356 against the United States and in favor of the Priest Rapids Irrigation District. Said District Court refused to allow any condemnation award for the so-called irrigation properties which had been valued by the jury in answer to the special interrogatory. Said District Court did order, adjudge and decree, regarding the \$170,500 which had been paid into court by the United States as the estimated just compensation for all of said irrigation district's properties, and which \$170,500 had been used to discharge the bonded indebtedness of said irrigation district, that said bonded indebtedness and said amount of estimated just compensation, \$170,500, were adjudged to be liquidated by the so-called irrigation properties

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)
valued at \$365,845, but for which no compensation was to be paid to the Priest Rapids Irrigation District. From the judgment of said District Court the United States appealed and the Priest Rapids Irrigation District cross-appealed.

III.

The United States Court of Appeals for the Ninth Circuit heard argument of said appeals on July 13, 1948; and on June 21, 1948, said Court of Appeals filed its opinion. Said Court of Appeals held that the lower court was in error in failing to provide in the judgment that \$170,500 paid by the Government should be applied as a credit against the award of \$473,356, and held that judgment against the Government for \$302,856 should be entered. The time allowed by law for the filing of a petition for writ of certiorari, seeking review by the Supreme Court of the United States of said appellate court's decision, expired on or about September 20, 1949, without any such petition for writ of certiorari having been filed and served by either the United States or the Priest Rapids Irrigation District. The decision of said Court of Appeals in said condemnation case has become final, and the Priest Rapids Irrigation District through its attorneys is taking appropriate steps in said District Court for further proceedings in conformance with said appellate court's decision; and in particular, there will soon be presented to said

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

District Court for entry in said condemnation action a form of judgment against the Government for \$302,856, together with interest, and there will be presented to said District Court applications or petitions for payment to the attorneys of the district of the attorneys' fee in said condemnation action, and for payment of said district's expenses, other than attorneys' fee, incurred in defense of said condemnation action.

IV.

The next to last paragraph of the judgment on verdict, entered by said District Court in said condemnation action on March 7, 1947, as amended by order of said court on March 14, 1947, reads as follows:

“It is Further Ordered, Adjudged and Decreed that the judgment, and the whole thereof, shall be paid into this Court until such time as this Court shall order the payment of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and”

Neither the United States nor the Priest Rapids Irrigation District appealed from said paragraph or the provisions thereof. The petitioners are informed and believe, in view of further, and informal, proceedings had before said District Court,

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

that said District Court probably will defer payment of the balance of said condemnation judgment to the Superior Court of the State of Washington in and for Benton County until there has been adjudicated by said Superior Court, including disposition of any appeal therefrom, probable questions regarding the parties to whom the assets of the Priest Rapids Irrigation District should be distributed—except that petitioners are informed and believe that said District Court will give consideration to such petitions or applications for payments from said condemnation award as may be deemed proper and be approved by said Superior Court as being necessary to meet expenses attendant to liquidation proceedings or other proceedings in said Superior Court in the above-entitled action.

V.

Petitioners are informed and believe and are advised and therefore allege that the Priest Rapids Irrigation District ceased to function, for the primary purposes for which it was organized and operated, on or about February 23, 1943, due to action by the United States in the exercise of its war powers, more particularly described in the following paragraphs of this petition.

VI.

On February 18, 1943, the Secretary of War pursuant to acts of Congress, and more particularly

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)
the Second War Powers Act, 1942, requested the Attorney General to institute condemnation proceedings to acquire fee simple title to certain described lands, "to be utilized for an establishment of a military reservation, and for other military uses incident thereto," and requested further, because "the utmost haste in expediting this project is vital to the successful prosecution of the war," that the Attorney General "procure an order of the court granting immediate possession of the aforesaid lands."

VII.

In accordance with said request, and pursuant to the authority of acts of Congress, and more particularly the Second War Powers Act, 1942, the United States on February 23, 1943, filed a petition for condemnation and a motion for right of immediate possession. On the same date, February 23, 1943, said District Court granted said motion and signed and entered an order granting right of immediate possession to certain described lands situated in Benton County, Washington, and containing 176,323 acres, more or less.

VIII.

Pursuant to a further letter, dated April 12, 1943, from the Secretary of War to the Attorney General, requesting amendment of said petition and order, to provide for acquisition of additional lands, an amended petition for condemnation was filed on

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

April 22, 1943. On the same date, April 22, 1943, a motion for right of immediate possession on amended petition was filed in said District Court, and said District Court on the same date, April 22, 1943, signed and entered an order granting right of immediate possession as to additional property.

IX.

The lands described in said petition and amended petition, as to which the United States, by said orders of said District Court, was given the right of immediate possession, included all of the lands belonging to the Priest Rapids Irrigation District, both its so-called power properties and its so-called irrigation properties. The lands covered by said petitions and said orders of said District Court also included all lands owned by parties other than the Priest Rapids Irrigation District and located within the boundaries of said irrigation district.

X.

Pursuant to said orders of said District Court giving the United States the right of immediate possession, the United States on April 1, 1943, took actual, physical possession of the so-called irrigation properties of the Priest Rapids Irrigation District, including the pumping plant and other parts of the irrigation district's distribution system; and took actual, physical possession of the so-called power properties of the Priest Rapids Irrigation

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

District on October 1, 1943. Said dates of taking actual, physical possession pursuant to said orders granting to the United States the right of immediate possession, were stipulated by the Government during the trial of said condemnation action in said District Court.

XI.

Upon the filing of said petition for condemnation and the granting of said order giving the right of immediate possession, on February 23, 1943, the Priest Rapids Irrigation District was able to function, for the primary purposes for which it had been organized and operated, only at the sufferance of the United States; and upon the United States taking actual, physical possession of said district's irrigation properties on April 1, 1943, the Priest Rapids Irrigation District was rendered utterly unable to function for the primary purposes for which it had been organized and operated, all by sovereign action of the United States of America in the exercise of its war powers.

XII.

After the United States commenced said condemnation proceedings and obtained said right of immediate possession to all of the properties of the Priest Rapids Irrigation District and to all of the lands within the boundaries of said district, and after the United States took actual, physical possession of the irrigation properties of said district

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)
on April 1, 1943, the United States took actual possession of the other properties of said district and of the tracts of lands within the boundaries of said district, from time to time as suited the Government's needs or convenience in its establishment of the military reservation, commonly known as the Hanford Works.

XIII.

The lands within the boundaries of the Priest Rapids Irrigation District, other than the lands owned by the district, were owned variously by individual farmers, the State of Washington, and other landowners, and were subject to assessments by said irrigation district up until that time on February 23, 1943, or not later than April 1, 1943, when the Priest Rapids Irrigation District, by sovereign action of the United States in the exercise of the war powers, was rendered incapable of functioning for the primary purposes for which said district had been organized and operated.

XIV.

The petitioners, de facto directors of the Priest Rapids Irrigation District, are informed and believe, and are advised, and petitioners therefore allege that the statutes of the State of Washington, under which the Priest Rapids Irrigation District was organized and operated as a municipal corporation, do not provide or contemplate any pro-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

ceeding for winding up the affairs and distributing the assets of an irrigation district summarily rendered incapable of functioning for the primary purposes for which it was organized, by reason of all of the district's properties and all of the lands located within the boundaries of the district being taken by the United States for military purposes.

In the decree of the above-entitled Court, signed and entered in the above-entitled cause on August 1, 1946, this Court ordered, adjudged and decreed that this Court retain jurisdiction of the above-entitled cause for appropriate supervision of the administration of the Priest Rapids Irrigation District and for further appropriate proceedings directed toward dissolution of said district and distribution of the assets of said district; and said court further ordered, adjudged and decreed:

“It is Further Ordered, Adjudged and Decreed that within a period of sixty days after final decision in said condemnation action, including final disposition of any appeal or review proceedings therein, said de facto directors shall report to this Court the final decision in said condemnation action and shall suggest, by petition to this Court, such proceedings directed toward dissolution of the Priest Rapids Irrigation District, appointment of trustees and distribution of the assets of said district as shall be deemed by them to be appropriate.”

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

XV.

In accordance with said order of August 1, 1946, petitioners suggest that this Court, having obtained jurisdiction of the trust estate made up of the properties of the Priest Rapids Irrigation District, including the right of the district to the condemnation award which stands in the place of the properties of said district which were taken in condemnation by the United States, this Court as a court of equity, in the absence of prescribed statutory procedure, has inherent power to administer the trust estate and see that it is distributed to the persons who are entitled to share in it; and that this Court may proceed either upon its own motion or upon the application of the trustees or beneficiaries.

XVI.

Petitioners further suggest that in equity the Priest Rapids Irrigation District, for purposes of determining the persons who are entitled to share in distribution of said trust estate, should be deemed to have been dissolved, in effect or de facto, on or about February 23, 1943, and in no event later than April 1, 1943, and that in equity the trust estate should be distributed equitably among the persons who, by reason of their interest in lands located within the boundaries of said irrigation district, were members of the group really interested in the success of said district and had to meet the burdens

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)
of said district prior to the disruptive action taken by the United States in February, 1943, in the exercise of war powers.

XVII.

Petitioners further suggest that, and petitioners are informed and believe and therefore allege that, the United States probably will assert, in further proceedings in the above-entitled cause directed toward winding up the affairs of said district and distributing the trust estate, that the United States is entitled to the trust estate to the exclusion of any right, title or interest asserted by any persons who, by reason of their interest in lands located within the boundaries of the irrigation district, were members of the group really interested in the success of said district and had to meet the burdens of said district prior to the disruptive action taken by the United States in February, 1943, in the exercise of war powers.

XVIII.

Petitioners further suggest that as two of the last elected directors of said district and as the de facto directors of said district they are qualified to represent, and appropriately can represent said district, and at least as against the adverse claim which probably will be made by the United States, all of the persons who, by reason of their interest in lands located within the boundaries of the irriga-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)
tion district, were members of the group really interested in the success of said district and had to meet the burdens of said district prior to the disruptive action taken by the United States in February, 1943, in the exercise of war powers. Petitioners further suggest that Richard S. Reiersen, the other of the last elected members of the board of directors of said district, but who resigned from said office and served as secretary of said district from 1943 to date, is likewise qualified to represent and appropriately can represent said district, and at least against said adverse claim which probably will be asserted by the United States, all of said persons. And petitioners suggest that B. Salvini, J. H. Evett and R. S. Reiersen should be appointed as liquidating trustees of the Priest Rapids Irrigation District to serve until further order of the above-entitled court.

XIX.

Petitioners further suggest that due notice and opportunity to be heard should be given to the United States, through the Attorney General of the United States, in connection with consideration and action by this Court on paragraph 4 of the prayer of this petition. Petitioners further suggest that the State of Washington, through its Attorney General, likewise should be given such notice and opportunity to be heard, in view of the fact that the Priest Rapids Irrigation District is a municipal corporation created by the State of Washington

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

and in view of the fact that the State of Washington, prior to the action of the United States in February, 1943, owned lands within the boundaries of the Priest Rapids Irrigation District and regularly, as such owner, bore its proportionate share of the burdens of said district.

XX.

Petitioners further suggest that the liquidating trustees of the Priest Rapids Irrigation District appointed by this Court should be authorized to employ attorneys to render legal services necessary in further proceedings in the above-entitled cause, upon terms subject to the approval of this Court; and that said liquidating trustees should be authorized to incur other expenditures necessary in said further proceedings, and that said liquidating trustees should receive compensation for their services, all subject to the approval of this Court.

Wherefore, petitioners pray that this Court in the exercise of its equity jurisdiction in the above-entitled cause:

(1) Appoint B. Salvini, J. H. Evett and R. S. Reiersen liquidating trustees of the Priest Rapids Irrigation District, to serve until further order of this Court;

(2) Authorize the liquidating trustees of the Priest Rapids Irrigation District to employ attorneys for legal services in further proceedings in

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)
the above-entitled cause, upon terms subject to the approval of this Court;

(3) Issue an order setting a date for a hearing on this petition and on paragraph 4 of this prayer, and requiring that notice of said hearing and opportunity to file an answer, cross-petition or other pleading responsive to this petition be given to the United States of America, through its Attorney General, and to the State of Washington, through its Attorney General; and requiring that said notice be published at least once in a newspaper of general circulation in Benton County;

Petitioners further pray that, upon said notice and hearing, this Court order, adjudge and decree that:

(4)(a) The Priest Rapids Irrigation District was, in effect and de facto, dissolved on or about February 23, 1943, and in any event no later than April 1, 1943;

(b) There is no prescribed statutory procedure or provision for winding up the affairs of the Priest Rapids Irrigation District and distributing the trust estate to the persons who are entitled to share in it, and this Court, as a court of equity, has inherent power to administer the trust estate of the Priest Rapids Irrigation District and see that it is distributed to the persons who are equitably entitled to share in it;

(c) The persons entitled to share in the trust

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

estate of the Priest Rapids Irrigation District are those persons who, by reason of their interest in lands located within the boundaries of the irrigation district, were members of the group which was really interested in the success of the Priest Rapids Irrigation District and had to meet the burdens of said district prior to the disruptive action taken by the United States in February, 1943, in the exercise of war powers;

(d) The liquidating trustees proceed to investigate records and report to this Court the names of said persons and their respective holdings of lands within the boundaries of said irrigation district on or about February 23, 1943, and in no event later than April 1, 1943, and proceed also to suggest to this Court such further proceedings and forms of notice thereof as shall be deemed by said liquidating trustees to be appropriate.

/s/ B. SALVINI,

/s/ J. H. EVETT.

State of Washington,
County of Yakima—ss.

We, B. Salvini and J. H. Evett, being first duly sworn on oath, depose and say: That we have read the within and foregoing Petition, know the contents thereof and believe the same to be true.

/s/ B. SALVINI,

/s/ J. H. EVETT.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)

Subscribed and sworn to before me this 19th day of November, 1949.

[Seal] /s/ CHARLES L. POWELL,
Notary Public in and for the State of Washington,
Residing at Kennewick.

Filed Nov. 25, 1949.

In the Superior Court of the State of Washington
for Benton County

No. 8035

C. I. WRIGHT, et ux, B. SALVINI, J. H.
EVETT and PRIEST RAPIDS IRRIGA-
TION DISTRICT, a Municipal Corporation of
the State of Washington,

Plaintiff,

vs.

HARLEY E. CHAPMAN, County Auditor of Ben-
ton County, Washington, and C. W. NESSLY,
County Treasurer of Benton County, Wash-
ington,

Defendant.

CERTIFICATE

I, Fred D. Kemp, County Clerk, and by virtue of the laws of the State of Washington ex-officio Clerk of the Superior Court of the State of Washington, in and for said County, do hereby certify that the annexed and foregoing is a true and correct copy

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 14—(Continued)
of the Petition of B. Salvini and J. H. Evett, De Facto Directors of the Priest Rapids Irrigation District, a Municipal Corporation of the State of Washington, Re Further Proceedings, Filed November 25, 1949, in the above-entitled action, as the same now appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 4th day of January, 1950.

FRED D. KEMP,
Clerk.

[Seal] By /s/ BESS ROYER,
Deputy.

(Whereupon, copy of summons and complaint in case No. 9913 was marked petitioner's Exhibit No. 15 for identification.)

(Whereupon, copy of answer and counter petition in case No. 9913 was marked petitioner's [87] Exhibit No. 16 for identification.)

Q. (By Mr. Cheadle): I hand you, Mr. Powell, what has been marked identification number 15, and ask you to identify it.

A. Identification number 15 is a certified copy of the summons and complaint filed in Benton County, Washington, in the Superior Court, in

(Testimony of Charles L. Powell.)

cause Number 9913, an action brought by the United States of America as plaintiff against the Priest Rapids Irrigation District and its directors and secretary.

Q. I'll have you identify next, Mr. Powell, what's been marked identification number 16.

A. Identification number 16 is the answer and counter-petition, a certified copy of the answer and counter-petition of the defendants in cause number 9913 in the Superior Court of the State of Washington for Benton County.

Mr. Cheadle: I'll offer in evidence as petitioner's Exhibit No. 15 what has been marked identification 15.

Mr. Ramsey: The same objection as was interposed to the preceding.

The Court: Overruled; 15 and 16 will be admitted.

Mr. Cheadle: And 16 will have the same objection, your Honor, and it is offered likewise.

(Whereupon, petitioner's Exhibits Nos. 15 and 16 for identification were admitted in evidence.) [88]

(Testimony of Charles L. Powell.)

PETITIONER'S EXHIBIT No. 15

In the Superior Court of the State of Washington
in and for Benton County

No. 9913

In the Matter of the Dissolution of
PRIEST RAPIDS IRRIGATION DISTRICT, a
Corporation.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

PRIEST RAPIDS IRRIGATION DISTRICT, a
Corporation, and B. SALVINI, J. H. EVETT
and R. S. REIERSON,
Defendants.

SUMMONS

The State of Washington to the above-named defendants: Priest Rapids Irrigation District, a Corporation, and B. Salvini, J. H. Evett and R. S. Reiersen:

Your are hereby summoned to appear within 20 days after the service of this summons, exclusive of the day of service, if served within the State of Washington, or 60 days if served out of the State of Washington, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the Complaint and Peti-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

tion for Dissolution which will be filed with the clerk of said court, a copy of which is herewith served upon you; and you are required to answer the Complaint and Petition for Dissolution and serve a copy of your answer upon the undersigned, at the address below stated, within said time.

HARVEY ERICKSON,

United States Attorney.

HART SNYDER,

Special Attorney for the
Department of Justice.

Office and Post Office Address:

506 Empire State Building,
Spokane 8, Washington.

Filed Nov. 15, 1949.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

In the Superior Court of the State of Washington
in and for Benton County

No. 9913

In the Matter of the Dissolution of
PRIEST RAPIDS IRRIGATION DISTRICT, a
Corporation.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

PRIEST RAPIDS IRRIGATION DISTRICT, a
Corporation, and B. SALVINI, J. H. EVETT
and R. S. REIERSON,
Defendants.

COMPLAINT AND PETITION
FOR DISSOLUTION

Comes now the plaintiff by the undersigned Harvey Erickson, United States Attorney for the Eastern District of Washington, and Hart Snyder, Special Attorney for the Department of Justice, acting under and by direction of the Attorney General of the United States, and for a cause of action against the above-named defendants, alleges:

1.

That defendant Priest Rapids Irrigation District is a corporation, organized and existing under the

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

laws of the State of Washington relative to the formation of irrigation districts; that the defendants B. Salvini, J. H. Evett and R. S. Reiersen are the last elected directors of said corporation, but that the term of office of which the said B. Salvini, J. H. Evett and R. S. Reiersen were elected as directors of the Priest Rapids Irrigation District, has long since expired, and that neither the said B. Salvini, J. H. Evett nor R. S. Reiersen own any land or evidence of title to land within the Priest Rapids Irrigation District, nor have they, nor any of them, owned any land or evidence of title to land within the boundaries of the Priest Rapids Irrigation District for more than five years past, and that the said B. Salvini, J. H. Evett and R. S. Reiersen have continued to conduct the affairs of the Priest Rapids Irrigation District for more than five years past solely as statutory trustees and not as duly elected and qualified directors of said district.

2.

That between February 23, 1943, and May 12, 1944, the plaintiff United States of America acquired the fee title to all lands within the boundaries of said district, and ever since has been and now is the owner in fee of all of said lands; that between February 23, 1943, and May 12, 1944, the plaintiff, United States of America, acquired in fee all lands owned by the said Priest Rapids Irrigation District, and all irrigation facilities owned by said dis-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

trict, including all hydro-electric generating and distribution facilities, all pumping plants, pipe lines, canals and laterals, and ever since has been and now is the sole owner of said facilities and properties; that said lands and said facilities were acquired by the United States of America for use in connection with the Hanford Atomic Energy Project, and have been and will continue to be used exclusively for said purposes; that the description of all land within the boundaries of the Priest Rapids Irrigation District is set forth in Exhibit A attached hereto and made a part hereof.

3.

That said Priest Rapids Irrigation District has no outstanding bonds, all of said bonds having heretofore been paid in full by plaintiff; that there are no freeholders nor holders of title or evidence of title to lands within said district who are qualified electors thereof; that said district has from time to time in the past secured the irrigation of portions of its lands and is not insolvent.

4.

That the lands within said district are no longer being irrigated, and said district has no further functions to perform, and no reason or purpose can be served by its continued existence.

5.

That the statutes of the States of Washington

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

make no provision for the dissolution of an irrigation district under the circumstances existing in this case; nevertheless, if not dissolved the said district will continue in existence, incurring further obligations and dissipating its assets in the unnecessary maintenance and continuation of its corporate existence.

6.

That the United States of America is the sole party interested in the lands and assets of said district and must necessarily suffer a substantial pecuniary loss and irreparable damage if said district is permitted to continue as an existing corporation, and plaintiff has no adequate or speedy remedy at law.

7.

That the appointment of a receiver is necessary for the purpose of liquidating the assets of said corporation, accepting and paying lawful claims against said corporation, and distributing the proceeds of such receivership to the person or persons entitled thereto, such receiver to act without compensation either for himself or for such attorneys as may represent him in these proceedings.

8.

That Bernard H. Ramsey is a citizen of the United States, and a resident and freeholder of the State of Washington, qualified and competent to serve

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

as such receiver, and if appointed will serve without compensation.

Wherefore plaintiff prays for relief as follows:

1. That the defendant Priest Rapids Irrigation District be dissolved and its corporate existence terminated;

2. That a receiver be appointed to accept and liquidate the assets thereof; to receive claims of creditors against such assets and to pay all lawful claims; and to distribute the remaining assets to the plaintiff herein, such receiver to act without compensation for himself or for such attorneys as may represent him.

HARVEY ERICKSON,

United States Attorney,

HART SNYDER,

Special Attorney for the Department of Justice,
Attorneys for Plaintiff.

State of Washington,
County of Yakima—ss.

Hart Snyder, being first duly sworn, on oath says:
That he is one of the attorneys for plaintiff above named, and makes this verification on its behalf;

That affiant has read the foregoing Complaint and Petition for Dissolution, knows the contents thereof, and believes the same to be true.

HART SNYDER.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

make no provision for the dissolution of an irrigation district under the circumstances existing in this case; nevertheless, if not dissolved the said district will continue in existence, incurring further obligations and dissipating its assets in the unnecessary maintenance and continuation of its corporate existence.

6.

That the United States of America is the sole party interested in the lands and assets of said district and must necessarily suffer a substantial pecuniary loss and irreparable damage if said district is permitted to continue as an existing corporation, and plaintiff has no adequate or speedy remedy at law.

7.

That the appointment of a receiver is necessary for the purpose of liquidating the assets of said corporation, accepting and paying lawful claims against said corporation, and distributing the proceeds of such receivership to the person or persons entitled thereto, such receiver to act without compensation either for himself or for such attorneys as may represent him in these proceedings.

8.

That Bernard H. Ramsey is a citizen of the United States, and a resident and freeholder of the State of Washington, qualified and competent to serve

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

as such receiver, and if appointed will serve without compensation.

Wherefore plaintiff prays for relief as follows:

1. That the defendant Priest Rapids Irrigation District be dissolved and its corporate existence terminated;

2. That a receiver be appointed to accept and liquidate the assets thereof; to receive claims of creditors against such assets and to pay all lawful claims; and to distribute the remaining assets to the plaintiff herein, such receiver to act without compensation for himself or for such attorneys as may represent him.

HARVEY ERICKSON,

United States Attorney,

HART SNYDER,

Special Attorney for the Department of Justice,
Attorneys for Plaintiff.

State of Washington,
County of Yakima—ss.

Hart Snyder, being first duly sworn, on oath says:
That he is one of the attorneys for plaintiff above named, and makes this verification on its behalf;

That affiant has read the foregoing Complaint and Petition for Dissolution, knows the contents thereof, and believes the same to be true.

HART SNYDER.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

Subscribed and sworn to before me this 8th day of November, 1949.

LIONEL PUGMIRE,

Notary Public Within and for the State of Washington, Residing at Yakima.

Filed Nov. 8, 1949.

Exhibit "A"

Beginning at the intersection of the south line of the right-of-way of the irrigation canal of the Consumers Ditch Company with the westerly bank of the Columbia River in Section 5 in Township 12 No., Range 28 E.W.M., thence westerly, northerly and southerly along the course of the southerly and westerly right-of-way line of said canal as the same is laid out and extends across, over and through Sections 5 and 6, in Township 12 North, Range 28 E.W.M., and across, over and through Section 31, in Township 13 North, Range 28 E.W.M., and across, over and through Sections 36, 35, 26, 27, 28, 21, 16, 17, 8, 7 and 6 in Township 13 North, Range 27 E.W.M., and across, over and through Section 1, in Township 13 North, Range 26 E.W.M., and across, over and through Sections 36, 25, 26, 27, 34, 33, 32 and 31 in Township 14 North, Range 26 E.W.M., and across, over and through Section 6, Township 13 North, Range 26 E.W.M., to the north and south center line of said Section 6; thence south along said center line to the north line of the right-of-way

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation; thence southwesterly along the north line of said right-of-way to the west line of said section; thence north along the west line of said section to the southerly bank of the Columbia River; thence down the Columbia River along the southerly and easterly bank thereof and around the bend of said river along the southerly and westerly bank thereof to the place of beginning, in said Section 5, Township 12 North, Range 28 E.W.M.

Excluding Therefrom the Following Described Lands, to wit:

Lots 225, 226, 227 Klondyke Terrace Point Orchards, and also shorelands in front of said property described as follows: Shorelands in front of Lot 7, Sec. 18, Tp. 14 N. Rg. 27, E.W.M., lying So. of E. & W. center line running across Lots 8 and 7 to the Columbia River;

Tracts 14, 15 and 16 in Sec. 31, Tp. 13 N., Rg. 28 E.W.M.

Tracts 9, 10, and 11 of Hanford Irrigation and Power Company's subdivision of Sec. 31, Tp. 13 N., Rg. 28 E.W.M., containing 15.98 acres, more or less.

Tracts 212, 213 and 214 Klondyke Terrace Point Orchard Tracts.

Tract 4 of Hanford Plat in Sec. 3, Tp. 13 N., Rg. 27 E.W.M.

Lot 6 in Sec. 3, Tp. 13 N., Rg. 27 E.W.M.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

all of the foregoing lands being located in Benton County, Washington.

In the Superior Court of the State of Washington
For Benton County

No. 9913

In the Matter of the Dissolution of
PRIEST RAPIDS IRRIGATION DISTRICT,
et al,

Plaintiff,

vs.

PRIEST RAPIDS IRRIGATION DISTRICT,
et al.,

Defendant.

CERTIFICATE

I, Fred D. Kemp, County Clerk, and by virtue of the laws of the State of Washington ex-officio Clerk of the Superior Court of the State of Washington, in and for said County, do hereby certify that the annexed and foregoing is a true and correct copy of the Summons, filed Nov. 15, 1949, and Complaint and Petition for Dissolution, filed Nov. 8, 1949, in the above-entitled action, as the same now appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my

(Testimony of Charles L. Powell.)

Petitioner's Exhibit 15—(Continued)

hand and affixed the seal of said Court this 4th day of January, 1950.

FRED D. KEMP,
Clerk.

[Seal] By /s/ BESS ROYER,
Deputy.

PETITIONER'S EXHIBIT No. 16

In the Superior Court of the State of Washington
in and for Benton County

No. 9913

In the Matter of the Dissolution of
PRIEST RAPIDS IRRIGATION DISTRICT, a
Corporation,

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PRIEST RAPIDS IRRIGATION DISTRICT, a
Corporation, and B. SALVINI, J. H. EVETT
and R. S. REIERSON,

Defendants.

ANSWER AND COUNTER PETITION

Come now the defendants, Priest Rapids Irrigation District, a municipal corporation of the State of Washington, and B. Salvini, J. H. Evett and

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

R. S. Reiersen, and in answer to the complaint and petition for dissolution in the above-entitled cause state and allege that:

1.

Defendants admit that the Priest Rapids Irrigation District is a corporation organized under the laws of the State of Washington relative to the formation of irrigation districts; but deny that said district is an existing corporation in all of the respects contemplated by said laws. Defendants admit that B. Salvini, J. H. Evett and R. S. Reiersen are the last elected directors of said district; that the terms of office for which they were elected as directors of the Priest Rapids Irrigation District have expired; that none of them now owns any land or evidence of title to land within the Priest Rapids Irrigation District; and that none of them has owned any land or evidence of title to land within the boundaries of said district for more than five years past; but defendants deny plaintiff's allegation that said B. Salvini, J. H. Evett and R. S. Reiersen have continued to conduct the affairs of the Priest Rapids Irrigation District for more than five years past solely as statutory trustees and not as duly elected and qualified directors of said district.

In further answer to paragraph 1 of said complaint and petition for dissolution defendants allege as follows: Said B. Salvini and J. H. Evett are de facto directors of the Priest Rapids Irrigation

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

District, as determined and adjudicated by the decree of the above-entitled Court on August 1, 1946, in the cause entitled Wright, et al. v. Chapman, et al., No. 8035 in the Superior Court of the State of Washington in and for Benton County. In said decree it was ordered, adjudged and decreed that "plaintiffs B. Salvini and J. H. Evett are de facto directors of the Priest Rapids Irrigation District and that, until further order of this Court as hereinafter provided for, said plaintiffs shall continue to function as directors of said district and in particular shall do any and all things necessary to the defense by said district against the petitioner in the condemnation action of United States of America v. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and necessary to protect otherwise the interests of said district;". The United States of America, plaintiff in the above-entitled cause, No. 9913, now has, and at all times material has had, knowledge and information of the provisions of said decree of August 1, 1946, in said cause No. 8035 in the above-entitled Court—the United States of America through Bernard H. Ramsey, Special Assistant to the Attorney General, having filed on or about May 1, 1946, in said cause No. 8035 a Suggestion of Interest in which the jurisdiction of the above-entitled Court in said cause No. 8035 was questioned; and the United States of America through said Bernard H. Ramsey, by motion for appointment of trustee

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

or receiver and for restraining order filed on May 6, 1946, in the United States District Court for the Eastern District of Washington in United States v. Alberts, et al., Civil No. 128, having sought to restrain further proceedings in said cause No. 8035 and to obtain by Federal court action the appointment of a trustee or receiver of said district, said motion for appointment of trustee or receiver and for a restraining order having been denied by the order of said Federal District Court entered on June 26, 1946; and said Bernard H. Ramsey having been furnished, informally as he requested, with a copy of said decree of August 1, 1946, entered by the above-entitled Court in said cause No. 8035, and having been furnished with copies of further proceedings had in said cause No. 8035 late in the year of 1946 and early in the year of 1947.

2.

Defendants admit the allegations of paragraph 2 of the complaint and petition for dissolution in the above-entitled cause.

In further answer to said paragraph 2 defendants allege as follows: The United States in the exercise of its war powers, by orders granting the right of immediate possession obtained by the United States pursuant to the provisions of the Second War Powers Act., 1942, in said action of United States v. Alberts, et al., Civil No. 128 in said Federal District Court, on February 23, 1943, and on April 12, 1943,

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

obtained the right of immediate possession to all lands within the boundaries of the Priest Rapids Irrigation District. Pursuant to said orders, the United States on April 1, 1943, took actual, physical possession of the so-called irrigation properties of said district, and on October 1, 1943, took actual, physical possession of the so-called power properties of said district; and from time to time, following entry of said orders granting right of immediate possession, the United States took actual possession of the tracts of lands within the boundaries of said district, as suited the Government's needs or convenience in its establishment of the military reservation now known as the Hanford Atomic Energy Project. By reason of the action of the United States on February 23, 1943, in obtaining one of said orders giving the right of immediate possession, the Priest Rapids Irrigation District was able to function for the primary purposes for which it had been organized and operated, only at the sufferance of the United States; and upon the United States taking actual, physical possession of said district's irrigation properties on April 1, 1943, the Priest Rapids Irrigation District was rendered utterly unable to function for the primary purposes for which it had been organized and operated, due to the sovereign action of the United States of America in the exercise of its war powers.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

3.

Defendants admit that the Priest Rapids Irrigation District has no outstanding bonds; but defendants deny that said bonds have heretofore been paid in full or in part by plaintiff, the files and records in *United States vs. Alberts, et al.*, Civil No. 128 in said Federal District Court showing that said bonds were paid pursuant to order of said District Court from the monies deposited in Court in 1944 by the United States as the estimated just compensation for all of the properties of the Priest Rapids Irrigation District which had been taken by the United States in 1943 pursuant to said orders of February 23, 1943, and April 12, 1943, giving the United States the right of immediate possession. Defendants admit that there are no freeholders or holders of title or evidence of title to lands within the Priest Rapids Irrigation District who are qualified electors thereof. Defendants admit that the Priest Rapids Irrigation District from time to time in the past, to wit: prior to the disruptive action of the United States of America on February 23, 1943, and April 1, 1943, secured the irrigation of portions of its lands and of lands within the boundaries of said district; and defendants admit that the Priest Rapids Irrigation District is not insolvent.

4.

Defendants admit that the lands within said dis-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

tract are no longer being irrigated, said lands and the properties of the district having been taken by the United States in the exercise of its war powers for the purpose of establishing and operating the military reservation now known as the Hanford Atomic Energy Project.

Defendants deny plaintiff's allegation that said district has no further functions to perform. In further answer to said allegation, defendants allege as follows: Pursuant to the August 1, 1946, decree of the above-entitled Court in said cause No. 8035 said district, and B. Salvini and J. H. Evett, de facto directors of said district, have the function of doing any and all things necessary to the defense by said district against the United States of America in the condemnation action of United States of America vs. Alberts, et al., Civil No. 128 in said Federal District Court, and have the function of doing all things necessary to protect otherwise the interests of said district. Said de facto directors, B. Salvini and J. H. Evett have filed a petition re further proceedings in said cause No. 8035, pursuant to and in accordance with the decree of the above-entitled Court, dated August 1, 1946, which reads in part as follows:

“It Is Further Ordered, Adjudged and Decreed that within a period of sixty days after final decision in said condemnation action, including final disposition of any appeal or review

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

proceedings therein, said de facto directors shall report to this Court the final decision in said condemnation action and shall suggest, by petition to this Court, such proceedings directed toward dissolution of the Priest Rapids Irrigation District, appointment of trustees and distribution of the assets of said district as shall be deemed by them to be appropriate.”

Defendants deny plaintiff's unqualified allegation that no reason or purpose can be served by the continued existence of the Priest Rapids Irrigation District; but defendants admit that no reason or purpose can be served by the continued existence of said district excepting the function, reason or purpose of continuing to do any and all things necessary to the defense by said district against the United States of America in said condemnation action, Civil No. 128 in said District Court, and to do all things necessary to protect otherwise the interests of said district, and to proceed further in the above-entitled Court in said cause No. 8035, through petition of the de facto directors, B. Salvini and J. H. Evett, in accordance with the above-entitled Court's decree of August 1, 1946, in said cause No. 8035.

5.

Defendants admit plaintiff's allegation that the statutes of the State of Washington make no provision for the dissolution of an irrigation district

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

under the circumstances existing in this case. In further answer to said allegation, defendants allege as follows: The above-entitled Court, in said cause No. 8035, having obtained jurisdiction of the trust estate made up of the properties of the Priest Rapids Irrigation District, including the right of the district to the condemnation award which stands in the place of the properties of said district which were taken in condemnation by the United States, this Court as a court of equity in said cause No. 8035, in the absence of prescribed statutory procedure, has inherent power to administer the trust estate and see that it is distributed to the persons who are entitled to share in it.

Defendants deny plaintiff's allegation that if not dissolved the said district will continue in existence, incurring further obligations and dissipating its assets in the unnecessary maintenance and continuation of its corporate existence. Defendants admit that if not dissolved said district would continue its formal corporate existence, incurring such expenses as necessary to said continuation; but defendants deny any direct or inferential allegation in paragraph 5 of plaintiff's complaint and petition for dissolution that there has been in the past, or that there is now, or that there is threatened, any incurring of unnecessary obligations or any dissipating of said district's assets. In further answer defendants allege as follows: Obligations incurred and expenditures of said district's funds in the past have been

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

only such as were necessary in the functioning of the district for the purposes for which it was organized and operated; and after the disruptive action of the United States taken in February and April, 1943, in the exercise of the Federal Government's war powers, said district has incurred only such obligations and has made only such expenditures of its funds as were necessary in defense against the United States of America in the aforesaid condemnation action; and subsequent to August 1, 1946, said district through its said de facto directors has incurred only such obligations and made only such expenditures as were necessary in carrying out the provisions of the decree entered on August 1, 1946, by the above-entitled Court in said cause No. 8035. Said de facto directors have acted and now are continuing to act in strict accordance with said decree of August 1, 1946. There is no threatened dissipation of the assets of the Priest Rapids Irrigation District other than the threat involved in the continued actions of the United States of America, as exemplified by plaintiff's complaint and petition for dissolution in the above-entitled cause No. 9913, which was filed by the plaintiff notwithstanding plaintiff's full knowledge and information regarding the pending cause No. 8035 in the above-entitled Court, and in particular the decree of August 1, 1946, therein, and notwithstanding the general knowledge and information had in October, 1949, by the United States through its officer Ber-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

nard H. Ramsey, Special Assistant to the Attorney General, of the activities of said de facto directors and said district's attorneys directed toward the filing of a petition re further proceedings in said cause No. 8035, which petition was signed by said de facto directors on November 19, 1949, and was filed in said cause No. 8035 on November 23, 1949.

6.

Defendants deny the allegations of paragraph 6 of said complaint and petition for dissolution.

In particular, defendants deny that plaintiff is the sole party interested in the assets of said district; and defendants deny that plaintiff has any interest whatever in any of the assets of said district.

Defendants admit that the United States owns and holds the fee title interest in and to the lands which were the lands of said district before the United States took said lands in the exercise of the Federal Government's war powers in 1943, which taking rendered said district utterly unable to function for the primary purposes for which it had been organized and operated. But defendants deny that the United States of America has any interests whatsoever in the present assets of said district, and in particular deny that the United States has any interest whatsoever in the condemnation award in said Civil action No. 128 in said Federal District Court, which award stands in the place of the lands and properties of said district

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)
which were taken by the United States in the exercise of its war powers.

Defendants deny that the United States would necessarily, or otherwise, suffer a substantial pecuniary loss or any loss whatsoever, or irreparable damage or any damage whatsoever, if said district were permitted to continue as an existing corporation; and defendants deny any allegation by plaintiff, inferential or otherwise, in paragraph 6 of plaintiff's complaint and petition for dissolution that the Priest Rapids Irrigation District or all of the defendants or any of them is threatening to continue or threatening to attempt to continue the formal corporate existence of said district.

Defendants deny plaintiff's allegation that plaintiff has no adequate or speedy remedy at law; and more specifically defendants deny that plaintiff has any cause of action which would entitle plaintiff to any remedy at law or in equity with regard to the matters set forth in the complaint and petition for dissolution in the above-entitled cause No. 9913.

In further answer to paragraph 6 of said complaint and petition for dissolution defendants allege as follows: In said cause No. 8035 in the above-entitled Court—in which pending cause No. 8035 the above-entitled Court in 1946 did take and did retain jurisdiction of said cause for appropriate supervision of the administration of the Priest Rapids Irrigation District and for further appropriate proceedings directed toward dissolution of said district

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

and distribution of the assets of said district—the United States of America has had and does have now full opportunity to present and have adjudicated any contention of the United States that the United States is entitled, in proceedings for the winding up of the affairs of said district, to recoup for the United States the condemnation award which the United States, in said condemnation action Civil No. 128 in said Federal District Court, was required to pay for the properties of said irrigation district which the United States took in the exercise of the Federal Government's war powers.

7.

Defendants deny the allegations in paragraph 7 of the complaint and petition for dissolution in the above-entitled cause No. 9913. In further answer to said paragraph 7, defendants allege as follows: The United States of America through Bernard H. Ramsey, Special Assistant to the Attorney General of the United States, has had at all material times and does have now knowledge that in the pending cause in the above-entitled Court, said No. 8035, this Court has taken and does retain jurisdiction of said cause No. 8035 for the purpose of winding up the affairs of the Priest Rapids Irrigation District.

8.

Defendants deny the allegations of paragraph 8 of said complaint and petition for dissolution, ex-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

cept that defendants admit that Bernard H. Ramsey is a citizen of the United States.

In objection to plaintiff's complaint and petition for dissolution in the above-entitled cause No. 9913 for the reason that there is another action pending in the above-entitled Court involving the same subject matter, in which the plaintiff has appeared for the purpose of filing a Suggestion of Interest and in which plaintiff has had and does now have opportunity to seek such relief, if any, to which the plaintiff may be entitled; and in further and affirmative answer to said complaint and petition for dissolution, by affirmative statement of matters constituting a defense and, in the alternative, constituting a counter claim, the defendants allege that:

I.

Defendants B. Salvini and J. H. Evett are two of the plaintiffs in the pending cause entitled C. I. Wright and Mamie Wright, husband and wife, B. Salvini, J. H. Evett and Priest Rapids Irrigation District, a municipal corporation of the State of Washington, plaintiffs, vs. Harley E. Chapman, County Auditor of Benton County, Washington, and C. W. Nessly, County Treasurer of Benton County, Washington, defendants, being cause No. 8035 in the above-entitled court.

II.

Said cause No. 8035 was heard by this Court on the merits on July 12, 1946; and earlier proceedings which involved said cause are recited in the decree

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)
of August 1, 1946, which this Court entered after said hearing on the merits. Said decree of this Court, dated August 1, 1946, and entered in said pending cause No. 8035, reads as follows:

The above-entitled cause having come on for trial on the 12th day of July, 1946, the plaintiffs being represented by their attorney, J. K. Cheadle, and the defendants by their attorney, Andrew Brown; said cause, pursuant to stipulation of counsel, having been consolidated for purposes of trial with the action of Dietrich, et al. vs. Chapman, et al., No. 7987; and A. E. Taylor, successor of Harley E. Chapman as County Auditor of Benton County, on motion made in open court and pursuant to consent of his attorney, appearing for him, having been substituted for said Harley E. Chapman as a party defendant; and a suggestion of want of jurisdiction of this Court having been presented by the Suggestion of Interest filed herein by the United States of America on May 1, 1946, and an analogous question of jurisdiction having been decided previously in favor of the jurisdiction of this Court by this Court's denial on April 11, 1946, of the motion to quash and dismiss filed in said action No. 7987 by the United States of America under special appearance for that purpose, and the jurisdiction of this Court in the above-entitled cause having been upheld by the denial of the motion for appointment of trustee or receiver and for restraining order filed by the United States of America on May 6, 1946, in

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

the United States District Court for the Eastern District of Washington in United States vs. Alberts, et al., Civil No. 128, and denied by the order of said Court entered on June 26, 1946, and this Court having decided on July 12, 1946, in conformance with said prior decisions and contrary to said suggestion, that this Court has jurisdiction, and accordingly having proceeded to trial on the merits; and upon said trial it appearing to the Court, and being so found by the Court, that the facts are as alleged in the complaint and in particular that the defendants, although acting in good faith, have threatened to refuse to issue and pay warrants on the funds of the Priest Rapids Irrigation District on the basis of vouchers approved by the plaintiffs B. Salvini and J. H. Evett; and the Court, upon consideration of the facts and the applicable law and being fully advised in the premises, having concluded that the plaintiffs are entitled to a decree granting relief against the defendants and making provisions for further appropriate proceedings;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: That plaintiffs B. Salvini and J. H. Evett are de facto directors of the Priest Rapids Irrigation District and that, until further order or decree of this Court as hereinafter provided for, said plaintiffs shall continue to function as directors of said district and in particular shall do any and all things necessary to the defense by said district against the petitioner in the condemnation action of

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

United States of America vs. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and necessary to protect otherwise the interests of said district; and that pursuant to vouchers approved by said de facto directors, the County Auditor of Benton County, Washington, shall issue warrants, and the County Treasurer of Benton County, Washington, shall pay said warrants, in the same manner and with the same effect as provided by the laws of the State of Washington with respect to vouchers approved by irrigation district directors.

It Is Further Ordered, Adjudged and Decreed that this Court retains jurisdiction of this cause for appropriate supervision of the administration of said irrigation district and for further appropriate proceedings directed toward dissolution of said district and distribution of the assets of said district.

It Is Further Ordered, Adjudged and Decreed that any award in the condemnation action, United States of America vs. Clements P. Alberts, et al., Civil No. 128, which may be ordered by the District Court of the United States for the Eastern District of Washington to be paid to the Priest Rapids Irrigation District, shall upon receipt by said district be paid into this Court, to be paid out upon order of this Court after further appropriate proceedings.

It Is Further Ordered, Adjudged and Decreed that within a period of sixty days after final decision in said condemnation action, including final

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

disposition of any appeal or review proceedings therein, said de facto directors shall report to this Court the final decision in said condemnation action and shall suggest, by petition to this Court, such proceedings directed toward dissolution of the Priest Rapids Irrigation District, appointment of trustees and distribution of the assets of said district as shall be deemed by them to be appropriate.

Done in open court this 1st day of August, 1946.

/s/ TIMOTHY A. PAUL,

Judge of the Superior Court.

A copy of said decree was furnished, informally as he requested, to Bernard H. Ramsey, Special Assistant to the Attorney General of the United States, and the attorney who, for the United States, on May 1, 1946, filed in said cause No. 8035 the "Suggestion of Interest to United States of America" and who represented the United States in the motion for appointment of trustee or receiver and for restraining order filed in the Federal District Court, as recited in the order of this Court set forth above.

In accordance with this Court's decree entered in said cause No. 8035 on August 1, 1946, ordering B. Salvini and J. H. Evett, the de facto directors of the Priest Rapids Irrigation District, to continue to function as directors of said district and in particular to do any and all things necessary to the defense by said district in the condemnation action

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)
of United States of America vs. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and to protect otherwise the interests of said district, said B. Salvini and J. H. Evett have continued to function as directors of the Priest Rapids Irrigation District and have done all things necessary to the defense of said district in said condemnation action.

IV.

Said condemnation action came on for trial before said United States District Court on February 10, 1947, and on February 20, 1947, the jury rendered its verdict. The jury found that the just compensation to be paid for the taking of that portion of the properties of the Priest Rapids Irrigation District, not devoted and applied to irrigation purposes, was \$473,356. In answer to a special interrogatory, the jury found that the value of that part and portion of the properties of said district, devoted and applied to irrigation purposes, was \$365,845.

During the course of said trial, and in the absence of the jury, said district offered to prove that the Government had paid, in compensation awards, settlements, and deposits in Court only \$630,960.80 for all of the lands within said district, including all of the improvements on said lands as well as any crops growing thereon. Said offer of proof, made in the absence of the jury, was not made as an offer of evidence bearing on the value of said district's

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

own properties, but was made as an offer of evidence relevant and material to the legal issue of whether said district was entitled to compensation for all of its own properties, and in refutation of the Government's contention that the compensation paid for the lands within said district reflected the value of the properties of said district itself. The Government's objection to the offer of proof, made in the absence of the jury, was sustained and the offer rejected. Subsequently, the jury, by its aforesaid verdict and its aforesaid answer to the special interrogatory, determined that the total value of the properties of said district itself was \$839,201.

The said District Court's judgment on the aforesaid verdict gave judgment in the sum of \$473,356 against the United States and in favor of the Priest Rapids Irrigation District. Said District Court refused to allow any condemnation award for the so-called irrigation properties which have been valued by the jury in answer to the special interrogatory. Said District Court did order, adjudge and decree, regarding the \$170,500 which had been paid into court by the United States as the estimated just compensation for all of said irrigation district's properties, and which \$170,500 had been used to discharge the bonded indebtedness of said irrigation district, that said bonded indebtedness and said amount of estimated just compensation, \$170,500, were adjudged to be liquidated by the so-called ir-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

rigation properties valued at \$365,845 but for which no compensation was to be paid to the Priest Rapids Irrigation District. From the judgment of said District Court the United States appealed and the Priest Rapids Irrigation District thereupon cross appealed.

V.

The United States Court of Appeals for the Ninth Circuit heard argument of said appeals on July 13, 1948; and on June 21, 1949, said Court of Appeals filed its opinion. Said Court of Appeals held that the lower court was in error in failing to provide in the judgment that the \$170,500 deposited by the Government should be applied as a credit against the award of \$473,356, and held that judgment against the Government for \$302,856 should be entered. The time allowed by law for the filing of a petition for writ of certiorari, seeking review by the Supreme Court of the United States of said appellate court's decision, expired on or about September 20, 1949, without any such petition for writ of certiorari having been filed and served by either the United States or the Priest Rapids Irrigation District. The decision of said Court of Appeals in said condemnation case has become final, and the Priest Rapids Irrigation District through its attorneys has taken appropriate steps in said District Court for further proceedings in conformance with said appellate court's decision; and in particular

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

there was presented to said District Court for entry in said condemnation action, and signed and entered by said District Court on November 21, 1949, a deficiency judgment against the Government for \$302,856, together with interest, and there were filed in said action in said District Court on November 21, 1949, applications or petitions for payment to the attorneys of the district of the attorneys' fee in said condemnation action and for payment of said district's expenses, other than attorneys' fee, incurred in defense of said condemnation action.

VI.

The next to last paragraph of the modified judgment on verdict, entered by said District Court in said condemnation action on November 21, 1949, reads as follows:

“It Is Further Ordered, Adjudged and Decreed that said deficiency judgment of \$302,856.00, together with interest as above ordered, and the whole thereof, shall be paid into this Court and remain subject to the orders of this Court until such time as this Court shall order the payment of the balance of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and”

Defendants are advised and informed and believe, and defendants therefore allege, that said District

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

Court probably will defer payment of the balance of said condemnation judgment to the Superior Court of the State of Washington in and for Benton County until there has been adjudicated by said Superior Court, including disposition of any appeal therefrom, probable questions regarding the parties to whom the assets of the Priest Rapids Irrigation District should be distributed—except that said District Court probably will give consideration to such petitions or applications for payments from said demnation award as may be deemed proper and be approved by said Superior Court as being necessary to meet expenses attendant to liquidation proceedings or other proceedings in said Superior Court.

VII.

Defendants are informed and believe and are advised and therefore allege that the Priest Rapids Irrigation District ceased to function, for the primary purposes for which it was organized and operated, on or about February 23, 1943, due to action by the United States, in the exercise of its war powers, more particularly described in the following paragraphs.

VIII.

On February 18, 1943, the Secretary of War pursuant to acts of Congress, and more particularly the Second War Powers Act, 1942, requested the Attorney General to institute condemnation proceedings to acquire fee simple title to certain described lands,

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

“to be utilized for the establishment of a military reservation, and for other military uses incident thereto,” and requested further, because “the utmost haste in expediting this project is vital to the successful prosecution of the war,” that the Attorney General “procure an order of the court granting immediate possession of the aforesaid lands.”

IX.

In accordance with said request, and pursuant to the authority of acts of Congress, and more particularly the Second War Powers Act, 1942, the United States on February 23, 1943, filed a petition for condemnation and a motion for right of immediate possession. On the same date, February 23, 1943, said District Court granted said motion and signed and entered an order granting right of immediate possession to certain described lands situated in Benton County, Washington, and containing 176,323 acres, more or less.

X.

Pursuant to a further letter, dated April 12, 1943, from the Secretary of War to the Attorney General, requesting amendment of said petition and order, to provide for acquisition of additional lands, an amended petition for condemnation was filed on April 22, 1943. On the same date, April 22, 1943, a motion for right of immediate possession on amended petition was filed in said District Court and said

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

District Court on the same date, April 22, 1943, signed and entered an order granting right of immediate possession as to additional property.

XI.

The lands described in said petition and amended petition, as to which the United States, by said orders of said District Court, was given the right of immediate possession, included all of the lands belonging to the Priest Rapids Irrigation District, both its so-called power properties and its so-called irrigation properties. The lands covered by said petitions and said orders of said District Court also included all lands owned by parties other than the Priest Rapids Irrigation District and located within the boundaries of said irrigation district.

XII.

Pursuant to said orders of said District Court giving the United States the right of immediate possession, the United States on April 1, 1943, took actual, physical possession of the so-called irrigation properties of the Priest Rapids Irrigation District, including the pumping plant and other parts of the irrigation district's distribution system; and took actual, physical possession of the so-called power properties of the Priest Rapids Irrigation District on October 1, 1943. Said dates of taking actual, physical possession pursuant to said orders granting to the United States the right of immediate

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

possession, were stipulated by the Government during the trial of said condemnation action in said District Court.

XIII.

Upon the filing of said petition for condemnation and the granting of said order giving the right of immediate possession, on February 23, 1943, the Priest Rapids Irrigation District was able to function, for the primary purposes for which it had been organized and operated, only at the sufferance of the United States; and upon the United States' taking actual, physical possession of said district's irrigation properties on April 1, 1943, the Priest Rapids Irrigation District was rendered utterly unable to function for the primary purposes for which it had been organized and operated, all by sovereign action of the United States of America in the exercise of its war powers.

XIV.

After the United States commenced said condemnation proceedings and obtained said right of immediate possession to all of the properties of the Priest Rapids Irrigation District and to all of the lands within the boundaries of said district, and after the United States took actual, physical possession of the irrigation properties of said district on April 1, 1943, the United States took actual possession of the other properties of said district and of the tracts of lands within the boundaries of said

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

district, from time to time as suited the Government's needs or convenience in its establishment of the military reservation now known as the Hanford Atomic Energy Project.

XV.

The lands within the boundaries of the Priest Rapids Irrigation District, other than the lands owned by the district, were owned variously by individual farmers, the State of Washington, and other landowners, and were subject to assessments by said irrigation district up until that time on February 23, 1943, or not later than April 1, 1943, when the Priest Rapids Irrigation District, by sovereign action of the United States in the exercise of the war powers, was rendered incapable of functioning for the primary purposes for which said district had been organized and operated.

XVI.

Defendants are informed and believe, and are advised, and defendants therefore allege that the statutes of the State of Washington, under which the Priest Rapids Irrigation District was organized and operated as a municipal corporation, do not provide or contemplate any proceeding for winding up the affairs and distributing the assets of an irrigation district summarily rendered incapable of functioning for the primary purposes for which it was organized, by reason of all of the district's

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

properties and all of the lands located within the boundaries of the district being taken by the United States for military purposes.

XVII.

In accordance with said order of August 1, 1946, in said cause No. 8035, defendants B. Salvini and J. H. Evett, as de facto directors of the Priest Rapids Irrigation District, have suggested to this Court in said cause No. 8035, by their petition re further proceedings therein, filed on November 23, 1949, that this Court having obtained and retained in said cause No. 8035 jurisdiction of the trust estate, made up of the properties of the Priest Rapids Irrigation District, including the right of the district to the condemnation award which stands in the place of the properties of said district which were taken in condemnation by the United States, this Court as a court of equity, in the absence of prescribed statutory procedure, has inherent power to administer the trust estate and see that it is distributed to the persons who are entitled to share in it; and that this Court in said cause No. 8035 may proceed either upon its own motion or upon the application of the trustees or beneficiaries.

XVIII.

Defendants B. Salvini and J. H. Evett, as said de facto directors, further suggested in said petition in said cause No. 8035, and here allege in the

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

above-entitled cause No. 9913, that in equity the Priest Rapids Irrigation District, for purposes of determining the persons who are entitled to share in distribution of said trust estate, should be deemed to have been dissolved, in effect or de facto, on or about February 23, 1943, and in no event later than April 1, 1943, and that in equity the trust estate should be distributed equitably among the persons who, by reason of their interest in lands located within the boundaries of said irrigation district, were members of the group really interested in the success of said district and had to meet the burdens of said district prior to the disruptive action taken by the United States, in February, 1943, in the exercise of war powers.

XIX.

Defendants allege that, as two of the last elected directors of said district and as the de facto directors of said district, B. Salvini and J. H. Evett are qualified to represent and appropriately can represent said district, and at least as against the adverse claim made by the United States, all of the persons who, by reason of their interest in lands located within the boundaries of the irrigation district, were members of the group really interested in the success of said district and had to meet the burdens of said district prior to the disruptive action taken by the United States in February, 1943, in the exercise of war powers. Defendants further allege that Richard S. Reiersen, the other of the last elected

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

members of the board of directors of said district, but who resigned from said office and served as secretary of said district from 1943 to date, is likewise qualified to represent and appropriately can represent said district, and at least against said adverse claim asserted by the United States, all of said persons. And defendants suggest that B. Salvini, J. H. Evett and R. S. Reiersen should be appointed as liquidating trustees of the Priest Rapids Irrigation District to serve until further order of this Court.

XX.

The liquidating trustees of the Priest Rapids Irrigation District should be appointed by this Court in said cause No. 8035. The liquidating trustees of said district should be authorized to employ attorneys to render legal services necessary in further proceedings, upon terms subject to the approval of this Court; and said liquidating trustees should be authorized to incur other expenditures necessary in further proceedings, and said liquidating trustees should receive compensation for their services, all subject to the approval of this Court.

Wherefore, defendants pray as follows:

1. That the complaint and petition for dissolution in the above-entitled cause No. 9913 be dismissed for the reason that there is pending in the above-entitled Court, in said No. 8035, another cause involving the same subject matter and in which the

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

United States of America has had and does now have opportunity to seek such relief, if any, to which the United States may be entitled; or,

2. In the alternative, that the complaint and petition for dissolution in the above-entitled cause No. 9913 be dismissed for the reason that said complaint and petition do not state facts sufficient to constitute a cause of action; or,

3. In the alternative, that the complaint and petition for dissolution be dismissed; and

4. That the defendants have and recover their costs and disbursements herein.

Alternative to paragraphs 1, 2 and 3 of this prayer, and without waiving the objections and defenses involved therein, defendants pray that this Court in the exercise of its equity jurisdiction in the above-entitled cause;

5. Appoint B. Salvini, J. H. Evett and R. S. Reiersen liquidating trustees of the Priest Rapids Irrigation District, to serve until further order of this Court;

6. Authorize the liquidating trustees of the Priest Rapids Irrigation District to employ attorneys for legal services in further proceedings in the above-entitled cause and related causes, upon terms subject to the approval of this Court;

Petitioners further pray, as part of said alterna-

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

tive, that this Court order, adjudge and decree that:

7. (a) The Priest Rapids Irrigation District was, in effect or de facto, dissolved on or about February 23, 1943, and in any event no later than April 1, 1943;

(b) There is no prescribed statutory procedure or provision for winding up the affairs of the Priest Rapids Irrigation District and distributing the trust estate to the persons who are entitled to share in it, and this Court, as a court of equity, has inherent power to administer the trust estate of the Priest Rapids Irrigation District and see that it is distributed to the persons who are equitably entitled to share in it;

(c) The persons entitled to share in the trust estate of the Priest Rapids Irrigation District are those persons who, by reason of their interest in lands located within the boundaries of the irrigation district, were members of the group which was really interested in the success of the Priest Rapids Irrigation District and had to meet the burdens of said district prior to the disruptive action taken by the United States in February, 1943, in the exercise of war powers;

(d) The liquidating trustees proceed to investigate records and report to this Court the names of said persons and their respective holdings of lands within the boundaries of said irrigation district on or about February 23, 1943, and in no event later

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

than April 1, 1943, and proceed also to suggest to this Court such further proceedings and forms of notice thereof as shall be deemed by said liquidating trustees to be appropriate.

PRIEST RAPIDS

IRRIGATION DISTRICT,

A Municipal Corporation of the State of Washington, by B. Salvini, de facto President and Director,

B. SALVINI,

J. H. EVETT,

By J. K. CHEADLE,

Of Attorneys for Defendants.

/s/ R. S. REIERSON.

State of Washington,
County of Spokane—ss.

We, R. S. Reiersen and J. K. Cheadle, the latter being of attorneys for defendants including J. H. Evett who is absent from the State of Washington, and B. Salvini who is not present in Spokane County, being first duly sworn on oath, depose and say: That we have read the within and foregoing Answer and Counter Petition, know the contents thereof and believe the same to be true.

/s/ R. S. REIERSON.

/s/ J. K. CHEADLE.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)

Subscribed and sworn to before me this 29th day of December, 1949.

JANE A. THOMPSON,
Notary Public in and for the State of Washington,
Residing at Spokane.

Copy received 12-30-1949—Hart Snyder.

Filed Jan. 4, 1950.

In the Superior Court of the State of Washington
For Benton County

No. 9913

IN THE MATTER OF THE DISSOLUTION OF
PRIEST RAPIDS IRRIGATION DIS-
TRICT, et al.,

Plaintiff,

vs.

PRIEST RAPIDS IRRIGATION DISTRICT,
et al.,

Defendant.

CERTIFICATE

I, Fred D. Kemp, County Clerk, and by virtue of the laws of the State of Washington ex-officio Clerk of the Superior Court of the State of Washington, in and for said County, do hereby certify that the annexed and foregoing is a true and correct copy of the Answer and Counter Petition, filed Jan.

(Testimony of Charles L. Powell.)

Petitioner's Exhibit No. 16—(Continued)
4, 1950, in the above-entitled action, as the same now appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 4th day of January, 1950.

FRED D. KEMP,
Clerk.

[Seal] By /s/ BESS ROYER,
Deputy.

Q. (By Mr. Cheadle): Mr. Powell, would you state to the Court, please, briefly, some of the history of the Priest Rapids Irrigation District, having in mind that part of the history which was put in issue, discussed and testimony about it adduced in the condemnation trial?

A. The action, the United States of America vs. Clements P. Alberts and others, cause number 128 in this court, was started on February 23, 1943. Shortly after that a notice was sent out to all of the land owners within the perimeter description shown in the original petition and the order for immediate possession, and immediately thereafter the irrigation district became concerned about its properties, particularly its power plant. At that time the power plant was not included in the condemnation proceeding, but was shortly after in the next petition filed. The irrigation district owned

(Testimony of Charles L. Powell.)

a power plant which was not used exclusively for the irrigation of its properties. The district sold surplus power to the Pacific Power and Light Company, and the question involved from the inception of the case was whether or not the irrigation district would be compensated for the value of its property over and above the values paid to the individual property owners.

The question was tried out in three or four different proceedings, and in order to get the matter at issue before the Court, while we weren't required to do so, in [89] behalf of the irrigation district we filed two or three answers, to which the government demurred, and we argued the matter of the main questions before the court here, before Judge Schwellenbach. The last argument before him was concluded in June of 1945, just before he went to Washington, D. C., as Secretary of Labor, and he handed down his memorandum opinion at that time which has been the basis of what's called the Schwellenbach formula; and from June, 1945, until his Honor's appointment in early 1946, I believe, there was no District Court Judge and therefore no proceedings, and shortly thereafter the proceedings were again brought up before the court and a date of trial was set in February, 1947.

The irrigation district was financially involved because of its indebtedness and outstanding warrants, and the exhibit, I believe 12, will show that there were warrants or had been warrants outstand-

(Testimony of Charles L. Powell.)

ing for some time; in fact, the exhibit will disclose that there was about 30 per cent paid in interest on a number of the warrants. The government in taking the property paid into court as estimated just compensation \$170,500, which was——

Q. If I may interrupt, Mr. Powell, when was it the government paid that into court?

A. In May of 1944; the exact date I do not remember.

Q. Well, the properties had been taken the preceding year of [90] 1943, is that it?

A. Possession of the irrigation properties on or about April 1, 1943, and possession of the power plant and transmission line on October 1, 1943; then the irrigation district paid from its funds the warrants with interest and some of the bonds and coupons, and depleted its own funds, thereby reducing the amount which the government would be required to pay in order to liquidate the remainder of the indebtedness, and so when we were discussing——

Q. If I may interrupt you there, when you say the amount the government would be required to pay in order to liquidate the indebtedness, you're stating there the amount the government would be required to pay per the government's intentions set forth in the declaration of taking, is that right?

A. Yes, and in the letter of the Secretary of War which accompanied the declaration of taking, it being framed on a different theory than declara-

(Testimony of Charles L. Powell.)

tions of taking ordinarily are framed; the theory was that since the government owned all of the land in the irrigation district, it became in effect the owner of all of the stock, as though this were a corporation, and therefore was not required to pay anything for the property of the irrigation district, that is, property owned by the district, so when the funds of the district were depleted and we came up to the time of trial [91] and the determination of the value of the irrigation district property, there was no money with which to pay the expert witnesses' expenses or fees, and no money to pay the other expenses of litigation, and it was necessary at that time that money be raised to do that, and necessary to sell the certificates of indebtedness at a discount and find somebody who would buy them, because even the payment of the certificates of indebtedness was contingent. We had at the time the contract was made the question of first, whether we could finance the litigation, and second, whether we would be successful in establishing and sustaining the Schwellenbach formula in this court and on appeal, and if we were successful, whether the jury's award would be of sufficient amount or substantial in that regard.

Q. Mr. Powell, going back to 1943, you were in court yesterday and heard the testimony of Mr. Reiersen? A. That's correct.

The Court: The declaration of taking was filed in 1944?

(Testimony of Charles L. Powell.)

A. May, 1944.

Q. Handing you petitioner's Exhibit Number 4, being the minutes of the June 10, 1943, meeting of the Priest Rapids board, I ask, was the agreement—well, was there an agreement reached with Moulton & Powell by the District as [92] stated in those minutes? A. Yes, there was.

Q. Did that agreement reached contemplate the services of Moulton & Powell in the test cases made up of certain individual landowners' cases to which Judge Schwellenbach, as shown in the transcript of record, referred to as being agreed upon among counsel and with the court in what would have been a pretrial conference had the Federal rules applied to condemnation, and that had taken place in the summer of 1943?

A. Would you mind reading that?

The Court: It's a question beyond me.

(Whereupon, the reporter read the pending question.)

The Court: Well, as somebody said in Hamlet, I think it's too long.

Mr. Cheadle: I fully agree, your Honor.

The Court: Why not ask Mr. Powell what was the contemplation of the parties at the time they made the contract?

Mr. Ramsey: May I ask what the purpose of this line of inquiry is? We have a contract here, then we have some minutes. Now we're going into the understanding outside of the contract and the

(Testimony of Charles L. Powell.)

minutes. Are we trying to vary the terms of the contract by the minutes of the board of directors and by the testimony of one of the contractual [93] parties? Is that the purpose?

The Court: Go ahead, Mr. Ramsey.

Mr. Ramsey: Well, I'm just inquiring of counsel. Frankly, I don't know where we're headed for.

Mr. Cheadle: The answer to your question is, no, we are not seeking to vary the terms of the contract. We are proposing to show your Honor that an agreement with the District was reached in June of 1943 by Moulton & Powell, as set forth in the minutes of the June 10 meeting. We have also introduced documentary evidence which shows that warrants for payment of the \$2,000 were drawn by the District and signed by Mr. Moulton on June 12, I believe, 1943. We are also showing what the work contemplated was, and we propose to submit, in view of documentary evidence and testimony, that the contract which is dated October 30 is the contract reduced to writing which sets forth the agreement reached June 10, and the record, the documentary evidence, does show that the payments which that contract dated October 30 states will be made in fact were made before then, and the contract itself refers to proceedings contemplated. Parol evidence would be admissible to show what proceedings were contemplated, and in further response to Mr. Ramsey's objection we can voice our objection, your Honor; we submit the government has no standing to question this petition. [94]

(Testimony of Charles L. Powell.)

Mr. Ramsey: I'd be interested in listening to counsel's reason for taking that position.

Mr. Cheadle: I can state it very briefly. Mr. Ramsey has no standing, the government has no standing to question this petition without the government begging the question, your Honor, that question which is pending in the Benton County proceedings, which has not been decided.

The Court: Well, I'm permitting the government to object here. I think we won't take much time on that question. I think Mr. Ramsey's position, as I understand it, is that here you have a contract, this \$2000 fee contract, according to the terms of which Moulton & Powell are to do all the work and perform all the services in connection with the litigation growing out of the taking of the District's property by the government. Now, Mr. Ramsey's point is, and I'm curious about it, too, what is your position with reference to that prior contract; if the contract means what it says, would there be any consideration for the later one? Is that your position or one of your points, Mr. Ramsey?

Mr. Ramsey: Yes.

Mr. Cheadle: We call attention, your Honor, to the fact that the contract——

The Court: The earlier one?

Mr. Cheadle: The earlier one, yes, your Honor, provides that "rendered by them as well as services to be rendered by them in connection with said litigation except that in the event that services not

(Testimony of Charles L. Powell.)

heretofore contemplated shall be required of attorneys, such additional compensation will be paid as the board of directors of District may deem proper and not otherwise.” We submit the documentary evidence, likewise the testimony of those who were parties to the contract, shows what they contemplated. We submit that is certainly admissible.

The Court: All right, on that theory I’ll permit you to show what was contemplated.

A. May I state it?

The Court: Just a moment; Mr. Ramsey, you may state any further objection you have.

Mr. Ramsey: In that connection, if the Court please, the contract itself provided——

The Court: You mean the \$2000 contract?

Mr. Ramsey: Yes.

The Court: The straight fee contract, we might call it, and the other the contingent contract.

Mr. Ramsey: The straight fee contract provided “except that in the event that services not heretofore contemplated shall be required of attorneys, such additional compensation will be paid as the board of directors of District may deem proper and not otherwise.” Now, who [96] is to determine, who is to say what services were not in contemplation on the 30th day of October, 1943, when this contract was drawn? This is a matter involving the board of directors of the District hiring an attorney. Now, is the attorney to be permitted to testify as to what was in contemplation in the mind

(Testimony of Charles L. Powell.)

of the District in this matter? It's left entirely to the District what further compensation shall be paid, if any.

The Court: Well, it seems to me that in the interest of orderly procedure, that I shouldn't try to decide this lawsuit on objections to the admission of evidence. I think within reason that the parties here should be permitted to put in the proof that supports their theory, and then I'll decide the effect of it and the questions of law at the conclusion of the case. The objection will be overruled, and you may answer.

Mr. Ramsey: Very well, your Honor.

A. (Witness): That work in contemplation of the parties at the time of the original contract was work pertaining to the irrigation district property and the government's assertion of rights against it as it was then pending. There was no declaration of taking filed at that time against the irrigation district properties, and therefore there was no condemnation action directly brought against the district properties, therefore it was not in the contemplation of the parties at that time the condemnation action and the questions later passed on which resulted in the Schwellenbach formula. That is why that provision is in the contract, and it is my recollection that we always discussed with the board of directors that when we knew what the government was going to do there would be a contingent fee contract.

Q. I'll ask this further question, Mr. Powell:

(Testimony of Charles L. Powell.)

Did the parties in that first contract, in the agreement stated in the June 10 minutes, June 10, 1943, minutes, contemplate the work of Moulton & Powell in connection with those test cases in which the matter of valuation of the district's own properties would be raised by way of offers of proof in those individual landowners' cases?

A. That was within the contemplation of the parties at that time, yes, because about that time, the exact date I don't recall, we had had a pretrial conference with Judge Schwellenbach and had tentatively agreed upon a method of presenting the questions.

Q. I believe you've already testified, Mr. Powell, that the District was organized about 1918?

A. I don't think so, but my recollection is that it was.

Q. Did it take over properties of earlier irrigation districts or companies which had been operating in the same area? [98]

A. Well, it didn't take them over right away; the District was organized some considerable time before it acquired the properties, and it was in 1930, I believe, that the irrigation district acquired the power plant and transmission line.

Q. You stated that the declaration of taking in 128-99 was filed in May of 1944. Were there further proceedings before Judge Schwellenbach, perhaps in chambers, in April which finally led to the filing of that declaration of taking?

Mr. Ramsey: I object to that question, if the

(Testimony of Charles L. Powell.)

Court please. In 1943 the government started filing the declarations of taking. The law wouldn't have required that any declaration of taking be filed at all; condemnations have been carried through without ever filing any declaration of taking; that is a matter strictly within the control of the government itself. Now, to question whether a conference between counsel and a judge in chambers led to the filing of a certain declaration of taking is completely outside the scope of reason.

The Court: Well, I'll sustain the objection to the question in that form. You might be permitted to say what was done or what proceedings were had or what pronouncement made by Judge Schwellenbach, without asking the witness to draw conclusions regarding it. [99]

Mr. Cheadle: Perhaps only for the benefit of our expert witnesses, your Honor, I suggest that this might be put into the record, re this petition, if I would read from page 82 of the transcript of record on appeal.

The Court: In this same case?

Mr. Cheadle: In this same case, your Honor, the transcript of record on appeal, No. 128-99, at page 82 of volume I of the three volumes of that transcript, it being the letter of May 4, 1944, addressed to the Attorney General, signed by the Secretary of War, Henry L. Stimson, the paragraph appearing on page 82 reading: "This Department has been recently advised that unless the declaration of taking covering the irrigation district's

(Testimony of Charles L. Powell.)

property and facilities is filed before June 1, 1944, the court will entertain a motion to set aside all verdicts returned during this term of court, and will permit in the future the defendant in all cases to show the value of the District's properties and facilities. It is the recommendation of this department that the declaration of taking enclosed herewith be filed immediately." And likewise appears in the same volume—I'm sorry, I don't have my marker in there, there appears the reporter's transcript of the proceedings before Judge Schwel-lenbach in April, 1944, in which he gave that advice.

Mr. Ramsey: And in the same transcript appears [100] repeatedly the statement made to the Court by government counsel that the government contemplated at all times filing a declaration of taking covering the taking of the district's properties as soon as all of the properties in the district had been covered by declaration of taking. Now, there never was any question of anything here except the time of the filing of that declaration of taking. The government was committed in the very first conference in the Judge's chambers in 1943 to do that very identical thing. Counsel stated to the Court at that time that the privately owned properties within the district would be acquired, a declaration of taking would be filed, deposits of estimated just compensation would be made, and that following the filing of the declaration of taking on the privately owned property that a declaration of taking would be filed covering the district owned prop-

(Testimony of Charles L. Powell.)

erties, so I don't know what counsel's purpose is in attempting to inject into the record here that somebody compelled the government to file a declaration of taking, or that it was brought about through the services of these attorneys.

The Court: Well, it would appear from the document counsel has read that there was, to say the least, gentle urging on the part of Judge Schwellenbach.

Mr. Ramsey: Yes, we had gentle urging on Judge Schwellenbach's part from the time of the first declaration [101] of taking; it was consistent.

Mr. Cheadle: Regarding that, we are content to let the record on appeal speak for itself.

Q. (By Mr. Cheadle): In the summer of 1944 were there conferences with the state and with government counsel regarding payment of the bonds out of the monies which had been deposited in court in the May declaration of taking?

A. I don't recall the exact date, but the state of Washington was the owner of the majority of the outstanding bonds of the district, and in a session here in Yakima with a representative from the Attorney General's office and I think all the directors and the secretary, an arrangement was made to withdraw the estimated just compensation and pay it to the state of Washington on the bonds and have the bonds delivered to the clerk of the court for marking as paid, and that was done then. I've forgotten the date of it; it was sometime, I think, in the early fall of 1944.

(Testimony of Charles L. Powell.)

The Court: I might say, Mr. Ramsey, regardless of what the purpose of the offer may be, I'm not taking it as any evidence of whether the government did or did not act fairly, properly or justly. That question isn't before me at this time, certainly.

Mr. Ramsey: I understand that.

The Court: I'm not taking any position on that at all, and I don't intend to. Go ahead. [102]

Q. (By Mr. Cheadle): You referred to the demurrer which the government made to the District's answer, and which was argued before Judge Schwel-lenbach and he decided by memorandum opinion in June of 1945. Then is it correct the District filed an amended answer in about September of that year? A. That's correct, yes.

Q. And the government then demurred in about October of 1945?

A. That's correct, and that matter was heard before Judge Driver in this court and continued to Spokane, where it was heard on May 31 and June 1 of 1946.

Q. It would be more correct to say that what was argued here on May 15 was only the government's motion to enjoin the Benton County proceedings, and that the demurrer was argued in Spokane on May 31 and June?

A. I thought they were both argued pretty well together; I didn't recall that they were separated.

Q. How long did the trial take, do you recall?

A. The total elapsed time as I recall was eleven days, from February 10, 1947, until February 20,

(Testimony of Charles L. Powell.)

1947, inclusive, with a weekend intervening of Saturday and Sunday in which the court recessed.

Q. Very briefly what did your work in preparation for trial consist of?

A. Well, we had to find witnesses who were experts in fixing [103] the value of power properties, and we discussed the matter generally with five or six engineers, and I was in conference repeatedly with a number of them, some of them not for a very lengthy time; one engineer from Oregon, Medford, I believe, we employed and he examined the district and then later was sent to South America and couldn't accept employment. I spent two days interviewing Mr. Dibble, from Redlands, California. I had to go to Butte to see him before the trial, and he came here and went over the properties; I spent two or three days with him, a day or so with Hugh Tinling, two or three days with Gerald Hall of Yakima, and a day or two with Mr. Stevens of Portland; they were the three witnesses we used principally in the case, and there was the preparation of exhibits also, which was done under their supervision and under our direction.

Q. Was the requirement of having expert testimony apparent in the summer of 1946?

A. Yes, it was.

Q. Was it then apparent that there would be, if the Schwellenbach formulat should be applied in the trial, was it apparent that there would be a necessity of having an allocation of the value of

(Testimony of Charles L. Powell.)

the power properties between irrigation and commercial power? A. Yes. [104]

Q. Did you also work on the appeal of this case to the Court of Appeals?

A. Yes, I did; Mr. Cheadle and I conferred repeatedly on the brief and the questions on appeal.

Q. Have you estimated, Mr. Powell, roughly the amount of time in hours which you spent on 128-99, or let us say on the Priest Rapids Irrigation condemnation case; 128-99, that docket number, did not develop until May of 1944, of course.

A. Well, I've made an estimate, but I'd rather not state it, because it doesn't seem to me as though it is—I might err either way; I didn't keep track of my time, I did not make any listing of the time that I consumed.

Q. Did it seem likely in the summer of 1946 that there would be an appeal in the case?

A. Yes, it did.

Q. Did it seem probable that the case might be carried to the Supreme Court of the United States?

A. Well, that of course no one could tell at that time. We thought that there was a possibility of it.

Mr. Cheadle: You may inquire.

Cross-Examination

By Mr. Ramsey:

Q. Mr. Powell, the firm of Moulton & Powell were attorneys for the Priest Rapids Irrigation District for a considerable time before 1943, were they not? [105] A. Yes.

(Testimony of Charles L. Powell.)

Q. On a contingent fee basis?

A. No, not before that, no.

Q. Not before that period?

A. I think on a retainer; I've forgotten that now, but Mr. Moulton looked after that principally; I think there was a small retainer of something like \$20.00 a month, as I recall.

Q. A monthly retainer fee; and how long a period before 1943 approximately had that arrangement existed?

A. Well, approximately six or eight years.

Q. For six or eight years the firm of Moulton & Powell handled all of the legal work for the District and had been on a monthly retainer?

A. That's my recollection, yes.

Q. Now, speaking of these test cases, do you remember what individual cases were there that were involved?

A. You mean the names of the property owners?

Q. Yes. A. Yes, I do.

Q. That was Mr. Parks?

A. Alec Parke.

Q. Mr. Deitrich?

A. Yes, John Deitrich and his son and daughter.

Q. And Mr. Wright? [106]

A. C. I. Wright, that's correct, and Winfield Shaw was the fourth one.

Q. The four individual cases were brought on for trial in a group? A. That's correct.

Q. The firm of Moulton & Powell represented

(Testimony of Charles L. Powell.)

Mr. Parke, Mr. Deitrich, the Deitrichs, and Mr. Shaw, did they not?

A. No, Mr. Wiehl represented Mr. Shaw and Mr. Wright; we represented Mr. Parke and Mr. Deitrich. The Deitrich tract, incidentally, was a Richland Irrigation District tract.

Q. Yes, I remember that. The firm of Moulton & Powell represented Parke and the Deitrichs?

A. That's correct.

Q. You were employed by the land owners in those cases? A. That's correct, yes.

Q. And you were paid an attorney fee by the land owners in those cases?

A. Yes, we were.

Q. So the testimony of Mr. Reiersen yesterday that the \$2,000 here was paid or in part paid to you for the purpose of trying these cases was erroneous, was it not?

A. Well, may I explain that by saying that in those cases Mr. Wiehl was paid also, but the District paid Mr. Wiehl a fee of \$300.00 for handling the Wright tract in the case, [107] that being a small non-irrigated tract, and the purpose of it being to compensate the attorneys for the additional work and effort necessary in presenting the issue to the Court by way of the offer of proof. The thought was not to pay the attorneys for handling the privately owned tracts, but to pay the attorneys for doing the work necessary to present the Irrigation District problem in the case involving the valuation of the privately owned tracts.

(Testimony of Charles L. Powell.)

Q. Now, Mr. Powell, if the matter of the value of the irrigation assets had been resolved in favor of the land owners, if they had been permitted to present to the jury their theory of the added value to their land because of those assets, the land owners would have directly benefited therefrom, wouldn't they?

A. I assume they would, Mr. Ramsey. That's a little bit difficult to say, but obviously, therefore, we were working against our own interests in that respect.

Q. The District didn't stand to make a dime out of this thing regardless of how it was determined, did they?

A. Out of the first, the preliminary matters?

Q. Yes.

A. Only in that they were trustees for the benefit of the land owners of the district.

Q. Well, as attorney for that District had you ever taken the [108] position that because they were trustees for the land owners in that District that it was any part of their duty to finance any litigation for the land owners?

A. Well, we've done even more than that; the Irrigation District has done a lot of things for the land owners at our suggestion and request.

Q. Unquestionably, but has there ever been a case where the District has found it proper or right to finance litigation on behalf of the land owners?

A. As a general proposition, no.

Q. Now, I assume that the attorney fee that

(Testimony of Charles L. Powell.)

you received from Mr. Parke and the Deitrichs in this case was adequate?

A. Well, it was in accordance with our agreement, yes, sir.

Q. Yes, but——

A. It compensated us, yes, sir; we have no complaint.

Q. Quite thoroughly for your time involved?

A. Well, we did some additional work in connection with the case on account of this irrigation problem.

Q. Well, frankly, Mr. Powell, it was the contention of the individual land owners, wasn't it, that they were entitled to extra value on their land by reason of the assets of the District, over and above the market value of the land?

A. That's correct.

Q. So that it was an issue of value in the individual cases which would result in a benefit to the land owners rather [109] than the District that you were presenting in putting forth your offer of proof there?

A. As a general proposition I presume that's correct.

Mr. Ramsey: Yes; I think that's all.

The Court: Any further questions?

Redirect Examination

By Mr. Cheadle:

Q. Mr. Ramsey inquired whether you were aware of any other cases where a District has

(Testimony of Charles L. Powell.)

financed litigation regarding land owners. Are you familiar with the so-called Sunnyside cases, United States against—I'm sorry, Fox, Parks and Ottmiller against Ickes?

A. No, I'm not except just generally, and I understood Mr. Chaffee was paid in that case on a per acreage basis which was added to the assessments of the District. I didn't know the District financed it.

Q. Are you familiar that the questions in that case were of considerable consequence to the District? A. Yes.

Q. And all of its land owners; and were those test cases selected by the government and the District, or do you know? A. I don't know.

Q. Mr. Ramsey inquired as to whether the compensation in the first contract was adequate. Did you or did you not mean that it was adequate for the work done in connection with [110] those test cases? A. State that again, please.

(Whereupon, the reporter read the pending question.)

Q. The individual land owners' cases.

A. Yes, it was adequate for the work done in the individual land owners' cases.

Q. Was it the compensation in amount agreed upon between you and the District on or about June 10 and reflected in the June 10 minutes?

A. You're referring to the compensation paid by Mr. Deitrich and Mr. Parke, or the compensation paid by the District?

(Testimony of Charles L. Powell.)

Q. No, I'm referring to the \$2,000. My question perhaps was ambiguous. I'm referring to the \$2,000 paid by the District to Moulton & Powell; was that adequate compensation for that work for the district contemplated by the parties on June 10?

Mr. Ramsey: Just a moment; before that's answered may I have that question again? I'm not sure I understood it.

The Court: I think what counsel is concerned about, you're not saying that was adequate compensation for all the work you've done in this condemnation case, including the appeals?

A. Oh, no, that's not what I understood the question to be, but I certainly wouldn't consider it so. [111]

Mr. Ramsey: I wouldn't assume so.

Mr. Cheadle: That's all.

(Whereupon, the witness was excused.)

Mr. Cheadle: Your Honor, if counsel will permit and the Court will permit, I would file the affidavit which I have prepared, executed last week and supplied copies to Mr. Shefelman as he stated; I think it should be filed if for no other reason than to have in the record the basis in part of Mr. Shefelman's testimony.

The Court: Have you seen the copy of that affidavit, Mr. Ramsey?

Mr. Cheadle: I just placed it on counsel's table this morning.

The Court: I see. Well, the Court will recess for ten minutes and then resume.

(Short Recess.)

The Court: Did you have the affidavit marked for identification by the Clerk?

Mr. Cheadle: I propose, your Honor, to offer it as an exhibit, and I propose to stipulate that were I to testify I would testify, among other things, to what appears in the affidavit.

(Whereupon, affidavit of Mr. Cheadle was marked Petitioner's Exhibit No. 17 for identification.)

Mr. Ramsey: If the Court please, for the purpose [112] of the record I want to object to the affidavit as being incompetent, irrelevant and immaterial. The objection is not predicated upon the grounds that the witness is present and could testify, nor is it predicated upon the grounds that we haven't the opportunity for cross-examination. I'm assuming that the Court can go through that affidavit and have no difficulty in determining what parts of it are pertinent, and it's really for the purpose of the record that I'm interposing the objection, in order to save any rights that we might have to object to incompetent portions of the record.

The Court: Well, I think it should be admitted if for no other purpose than in order to make complete the testimony of the expert Mr. Shefelman who said his testimony was based in part on the affidavit, and the record may show this is the affi-

davit he testified he referred to; for what further purposes, I'll take up when I read it. I haven't read it yet.

Mr. Ramsey: Well, frankly, I haven't either, your Honor.

(Whereupon, Petitioner's Exhibit No. 17 for identification was admitted in evidence.)

PETITIONER'S EXHIBIT No. 17

In the District Court of the United States for the
Eastern District of Washington Southern Division

No. 128-99

UNITED STATES OF AMERICA,

Petitioner.

vs.

CLEMENTS P. ALBERTS, et al., and PRIEST
RAPIDS IRRIGATION DISTRICT, a Municipal Corporation of the State of Washington,
Defendants.

AFFIDAVIT OF J. K. CHEADLE IN SUPPORT OF PETITION FOR PAYMENT OF ATTORNEYS' FEE

State of Washington,
County of Spokane—ss.

J. K. Cheadle, being first duly sworn on oath, deposes and says that:

In September 1945 Moulton & Powell conferred

(Petitioner's Exhibit 17—(Continued))

with me regarding the above-entitled case, and proposed that I assist them in preparation and presentation of the case.

On October 8, 1945, I commenced work on the Prid case. In the following 4 years (through November 21, 1949) I worked for more than 1000 hours on this case.

The case had priority over any and all other matters handled by me in that 4-year period; and frequently, especially in 1947, 1948 and 1949, giving the Prid case priority required that I "farm out" or turn over other law practice to other attorneys, or associate other counsel in other practice.

In October 1945 I spent about 65 hours in research in the law of eminent domain, with particular emphasis on federal statute and case law bearing on declarations of taking and bearing on condemnation actions in which immediate possession was taken, prior to the making of a deposit in court, pursuant to the provisions of 50 U.S.C.A. 171, et seq. (Second War Powers Act, 1942).

We were confronted with the Government's contention, made in connection with the Government's demurrer to the district's answer, that the district officials were not qualified to represent the district and to defend the action. And we were compelled to give consideration to such appropriate steps as might be taken to meet that contention of the Government. Since the district is a municipal corporation of the State of Washington, its existence and

(Petitioner's Exhibit 17—(Continued))

the qualifications of its officers were matters of state law. And since no irrigation district theretofore had been placed in the situation which resulted from the condemnation proceedings of the United States, the questions of state law as well as the questions of federal condemnation law were novel and unique. The novel and unique situation was recognized by Judge Schwollenbach in his memorandum opinion of June 1945, in which he announced his ruling sustaining the Government's demurrer to the district's original answer in the condemnation action. Our initial task was obtaining a different ruling on the Government's demurrer to the district's amended answer.

On November 1, 1945, I conferred for 3.25 hours with C. L. Powell; on November 2 and 3 made detailed examination (3.5 hours) of the voluminous court files in the clerk's office at Yakima; and on November 5 conferred for 4 hours with Moulton & Powell. Subsequently in November I prepared a first draft of brief (24 hours) in opposition to the Government's demurrer.

Also in the latter part of November, I commenced research in federal and state cases on intervention (4.5 hours)—it appearing that as “an anchor to windward” we should have a landowner (in a representative capacity) seek to intervene in the condemnation case, so that in the event the Government's demurrer to the amended complaint should be sustained on the ground that the district's officers

(Petitioner's Exhibit 17—(Continued))

were not qualified to act in defense in the condemnation action, the district and its former landowners would be represented by the intervening landowner.

On December 1, I traveled to Kennewick; and conferred with Moulton & Powell for 3 hours. Subsequently further work re intervention was performed by me in Spokane. Also, research and drafting of the complaint was commenced on a contemplated proceeding in the Benton County court, in which proceeding we might seek adjudication by the state court re the qualifications of the district's directors to act for the district (8 hours).

On December 18, 1945, Mr. Powell made a trip to Spokane; and on that day and the following day Mr. Powell and I conferred for a total of 5.5 hours.

In the latter part of December further work was performed in research and in further drafting of our brief in opposition to the Government's demurrer (27.5 hours).

During the last three months of 1945 and the first several months of 1946 the work on Priest Rapids matters was alternately under pressure and out from under pressure of time. Due to the fact that Judge Schwellenbach's vacated position on the district court had not been filled, there was uncertainty as to when the Government's demurrer would come on for hearing, it being informally agreed by counsel for the Government and by us that in the interest of all concerned the demurrer preferably

(Petitioner's Exhibit 17—(Continued))

should be heard by the same judge who probably would conduct the trial, if the demurrer should be overruled and the case go to trial.

Throughout January, February, March and April of 1946 much time was spent in putting into final form our brief in opposition to the Government's demurrer, and in final drafting and filing of the petition in intervention and writing a brief in support of intervention. During the same time much work was done on the Benton County case (Wright, et al. v. Chapman, et al., No. 8035). However, the time spent in representing Wright and the other plaintiffs in the Benton County case is not taken into account in the work performed in the condemnation case for the district, and is not reflected in the statement earlier in this affidavit that over 1000 hours work were performed by me in the condemnation case. The Benton County proceeding was deemed a part of the condemnation case work only through the preliminary stage, at the conclusion of which preliminary stage we concluded that the county court proceeding should be instituted.—Exclusive of the work in the Benton County case, my work in January, February, March and April of 1946 totaled approximately 200 hours.

During those months Mr. Powell and I conferred in Kennewick on January 22 and 23 for about 10.5 hours; and on February 9, 10 and 11 in Spokane for approximately 10 hours. Also, Mr. Powell and I conferred by telephone once a week or more fre-

Petitioner's Exhibit 17—(Continued)

quently, for probably a total of one hour per week.

On May 6, 1946, the Government filed a motion in the condemnation case for appointment of receiver or trustee of the district and for a restraining order enjoining any further proceeding in the Benton County case. On a show cause order, that motion came on for hearing before the Federal court in Yakima on May 15, 1946. Considerable time was spent in preparing a return to the rule, a brief, and in preparing reply to the Government's brief; and a half day in court was also involved. However, although this aspect of the Benton County case (*Wright v. Chapman*) involved work in the Federal condemnation action, my time and efforts on this matter have not been considered as work in the Federal condemnation action.—The court took the Government's motion under advisement at the conclusion of the May 15 hearing; and at a later court hearing in Spokane on June 1, 1946, the court announced its decision that the Government's motion be denied.

The Government's demurrer and a landowner's motion for leave to intervene were argued in Spokane on May 31 and June 1; and in the latter part of May considerable last-minute research and preparation work was done (18.5 hours).

Mr. Powell came to Spokane a day before the hearing; and we conferred on May 30 for 5.5 hours. Each of us was occupied with the hearing and with further preparation between court sessions, for a

Petitioner's Exhibit 17—(Continued)

total of 12 hours on May 31 and June 1, 1946.—The United States district court at the conclusion of the hearing on June 1 denied the Government's motion which had been argued in Yakima on May 15; and since the district court concluded that the state court proceeding should not be interfered with by the federal court and that the district's directors could and would continue to conduct the defense in the condemnation action on behalf of the district and its former landowners, the court denied the motion by a landowner for leave to intervene. More importantly, the United States district court overruled the Government's demurrer to the district's amended answer in the condemnation case.

In the balance of June, preparation was made for trial in the Benton County case, which was heard before Judge Paul on July 12, 1946, at Prosser. Judge Paul signed his decree in the case on August 1, 1946; and the decree granted the relief prayed for by the Priest Rapids Irrigation District and the other plaintiffs. My time in June and July on the Benton County case has not been recorded as time spent in Prid's Federal condemnation action.

In August 1946 we commenced preparation for jury trial of the Federal condemnation action. This work involved selection of and conferences with expert witnesses, and preparation on the many evidence questions which we anticipated would arise in the course of trial. Since irrigation distribution works are not frequently sold the questions involved

Petitioner's Exhibit 17—(Continued)

in valuation of the district's distribution works were not the usual questions encountered in the general run of condemnation actions. The valuation of the district's power plant in many respects was comparable to valuation of power plants as involved in condemnation of privately owned utilities by PUDs. However, the valuation of the district's power properties did have the complication arising from the fact that the power properties were used in part for furnishing irrigation pumping power and otherwise were used to produce power for sale commercially. Many of the evidence questions we anticipated were the usual evidence questions involved in usual condemnation actions. Other anticipated evidence questions were comparatively unique since they involved unusual aspects of valuation.

Mr. Powell principally handled the work with our expert witnesses and I principally handled work on the evidence questions. However, each of us as to his principal task conferred and checked with the other.

My time record shows that I worked on 61 separate days in preparation for the trial, in the period from August 14, 1946, to February 9, 1947, for a total of approximately 158 hours.—Mr. Powell and I were in frequent telephone conference during that period; and we conferred at Kennewick on August 24 and 25 for a total of 5 hours; for a total of 4 hours in Yakima and Kennewick on December 13, 1946, and for a total of 5 hours in Yakima and

Petitioner's Exhibit 17—(Continued)

Kennewick on January 20 and 21, 1947; for a total of 22 hours in Spokane on January 25, 26 and 27, 1947, during which time Mr. Powell and I, in addition to conferences between the two of us, conferred with expert witnesses Tinling and Dibble.

Included in the work I did in the above period was preparation of a trial brief which was submitted to the Court just prior to commencement of the trial. This trial brief was directed particularly to supporting our request that there be a special interrogatory put to the jury inquiring as to the value of the district's irrigation distribution works, the so-called irrigation properties. As regards those properties, the Court had indicated on June 1, 1946, that the Court would follow the so-called Schwellenbach formula and, as a matter of law, would not allow any condemnation award for said properties.

The trial commenced on February 10, 1947, and the case went to the jury and the jury returned its verdict on February 20, 1947. During the trial Mr. Powell handled interrogation of witnesses and summation to the jury, with myself assisting him at the counsel table; and I principally handled argument of evidence questions and questions of law, with assistance from Mr. Powell. However, we thoroughly collaborated with each other on all work during the trial. During the course of trial, considerable time was spent outside of court sessions in further interviewing witnesses, preparing additional, illustrative exhibits, and in drafting instruc-

Petitioner's Exhibit 17—(Continued)

tions to the jury. My time record shows 122 hours of work on the trial between February 10 and February 20, both inclusive.

Between February 21, 1947, and March 7, 1947, approximately 20 hours were spent in research and drafting the form of judgment on the verdict, in conference with Mr. Powell and in court in presenting the judgment. The controversial item in the form of judgment was that one which determined whether the \$170,500 which had been deposited in court by the Government and which had been used to pay off the outstanding bonds of the district should be credited against the jury verdict for the value of the so-called power properties or should be applied against the so-called irrigation properties, for which no award was allowed, but which the jury (in response to the special interrogatory) valued at \$365,845. On this matter, in addition to telephone conferences, 2 hours were spent in conference with Mr. Powell in Yakima on March 7, prior to the court hearing before the United States District Judge. The judgment was signed and entered that day.

From March 22, 1947, to and including June 6, 1947, about 6 hours were expended in research and drafting notice of cross appeal and arranging for filing notice of cross-appeal, in the event the Government filed notice of appeal, which the Government did on June 6.

Between June 9, 1947, and the end of 1947, I

Petitioner's Exhibit 17—(Continued)

spent approximately 70 hours (including 9 hours in conferences with Mr. Powell) on preliminary and incidental matters connected with the appeal and cross-appeal. Among such matters were: work on the designation of record, including a detailed check of the voluminous court file in Civil No. 128-99 and in other docket numbers in Civil No. 128, for the purpose of determining what records should be designated, in the interest of Prid; the designation of points to be relied upon by cross-appellant; and stipulations with the Government regarding costs of printing the record on appeal and briefs on appeal. My time records show that on these matters I worked on 31 separate days in June, July, August and September of 1947. My time records show that I was not required to perform any work on the Priest Rapids condemnation case in October, November or December of 1947.

In January of 1948 I commenced my research and drafting work on our appellate brief. The printed transcript of record was forwarded by the clerk of the Court of Appeals on December 29, 1947; and pursuant to stipulation of counsel, the Government's brief was due February 7, the Priest Rapids' brief was due 30 days after the Government's brief was served and the Government had an additional 30 days for reply brief.

The Government's brief was received by me on February 7, 1948.

Between January 14 and February 6, 1948 I spent

Petitioner's Exhibit 17—(Continued)

about 24 hours in research and preliminary drafting of the PRID brief, doing this work on 7 separate days. —Upon receipt of the Government's brief on February 7, 1948, I commenced intensive work on our brief. In research, drafting and redrafting (including 10.25 hours conferences with Mr. Powell in Spokane on February 17 and 18) I worked 136 hours on 26 separate days between February 7, 1948 and March 4, 1948, both inclusive, when the district's brief was mailed to counsel and the court.

Between March 5, 1948 and July 16, 1948, 52.5 hours were spent in preparation for appellate argument, in which Mr. Powell and I both participated, and in the trip to San Francisco for the argument which was heard on July 13, 1948. Included in the preparation was analysis of the Government's reply brief which was received by me on April 8, 1948, and preparation of oral rebuttal against the Government's reply brief. In this work, in addition to telephone conferences and correspondence with Mr. Powell, Mr. Powell and I conferred for 8 hours on July 1 and July 2 in Spokane and spent 10.5 hours in final preparation in San Francisco on July 12, 1948.

After submission of the case to the Court of Appeals, I performed no further work in the Priest Rapids condemnation case until March 7, 1949 when the Clerk of the District Court received an order from the Clerk of the Court of Appeals re a certified transcript of instructions in one of the

Petitioner's Exhibit 17—(Continued)

first condemnation docket numbers, covering individual farm lands, in Civil No. 128—which certified transcript the Court of Appeals had requested. On this matter I checked court files and checked the reporter's transcript and conferred with Mr. Powell by telephone, spending 2.5 hours on that matter.

After receipt of the Appellate Court's opinion, which was filed June 21, 1949, I spent approximately 35 hours studying and analyzing the opinion, conferring with Mr. Powell, and with the officers of the district who concluded that we would not petition for a writ of certiorari unless the Government petitioned—the Court of Appeals having decided that judgment should have been entered against the Government in the amount of \$302,856, which with interest amounted to a total sum in excess of \$400,000. In this work I conferred for 2 hours with Mr. Powell in Kennewick on July 1, 1949; and he and I conferred with the district's officers for 5 hours in Yakima on July 6, 1949; and following that meeting Mr. Powell and I conferred together for an additional 2 hours. —On these matters work was performed on 19 separate days between June 23, 1949 and September 9, 1949, it being on the latter date when I was informally but definitely advised by Assistant Attorney General Vanech in Washington, D. C. that the Government was not going to petition for writ of certiorari.

In October and November of 1949 I spent approximately 40 hours in conferences, drafting and

Petitioner's Exhibit 17—(Continued)

in appearances in court re the modified judgment, modified in accordance with the Court of Appeals' disposition of the case, and in petitions for the payment of district expenses. (This time is exclusive of time spent on our petition for payment of attorneys fees and exclusive of time spent on further proceedings in the Benton County court.) —Included in this work was 10 hours of conferences with Mr. Powell on October 9 and 10 in Yakima; and 2 hours he and I spent in conference with Mr. Ramsey and in conference in the Court's chambers on October 10.

Also Mr. Powell and I spent 6 hours on November 19 in conference between ourselves and in conference with the district's officials in their board meeting. And on November 21 Mr. Powell and I spent 3 hours in conference with Mr. Ramsey and in appearance with Mr. Ramsey before the Court for presentation of the modified judgment, which was signed by the United States District Judge on November 21, 1949.

No attempt has been made in the above brief description of work done to indicate the number of telephone conferences had with Mr. Powell nor the number of letters between us. Suffice it to say, by telephone calls and by correspondence we have kept each other fully and promptly informed of all developments in the case and of the progress being made by us in our work on the case.

The statements in this affidavit of the time I spent

Petitioner's Exhibit 17—(Continued)

in conferences and in court with Mr. Powell show that we spent approximately 300 hours together in conferences and in court. I have not stated, nor have I attempted to estimate, the very considerable amount of time spent by Mr. Powell in other aspects of his work on the condemnation case in the period from October 1945 through November 1949, nor the time spent by Moulton & Powell, and particularly Mr. Powell, in work on the case from February 1943 through September 1945.

The novelty and difficulty of the questions involved in the condemnation action against the district are shown in the Transcript of Record on appeal and in the briefs filed in the District Court and in the Court of Appeals.

/s/ J. K. CHEADLE.

Subscribed and sworn before me this 30th day of December, 1949.

/s/ JANE A. THOMPSON,

Notary Public in and for the State of Washington,
residing at Spokane.

Mr. Powell: If the Court please, I think there's one question that should be presented to the Court for the Court's information, and this involves the interpretation [113] of the contingent fee contract rather than the question of whether the fee in the contract is proper. The resolution upon which

our petition is now based sets forth a specific fee that the Board has agreed we should receive, based upon the contract; we have computed and the figure in that resolution is based upon a computation of the fee in accordance with the schedule of percentages given in the contract and applying 6 per cent interest from the date allowed in the judgment, that is, from October 1, 1943. If the computation is made upon the total judgment with interest the amount is somewhat smaller, and I wanted to mention that to your Honor as part of our case, because I felt your Honor might want to know how we arrived at the figure. There is a different method of computing it, if the interest is added to the total figure, then the 5 per cent would apply on the last \$122,000.00, but as we have computed it, the interest is computed at 6 per cent on a fee of approximately \$60,000.00 from October 1, 1943.

The Court: Well, that would be a matter of construction of the contract.

Mr. Powell: That's correct.

The Court: In case the Court holds with the petitioners on the other matters involved here.

Mr. Powell: That's correct, because there are two [114] possible constructions, and the District has construed it the way indicated by the resolution. I think that's all; we rest, your Honor.

The Court: The Clerk has just called my attention to the fact that ruling was reserved as to the admission of petitioner's identifications 7 and 8, and if you'll look at them I think it would be well

for you to decide whether you wish to renew the offer at this time or withdraw them.

Mr. Powell: It appears to us, if your Honor please, that they would not be particularly material, and therefore I would like to ask your Honor to permit us to withdraw them.

The Court: They may be withdrawn.

(Whereupon, petitioner's Exhibits No. 7 and 8 for identification were withdrawn.)

C. W. HALVERSON

called as a witness on behalf of the petitioner United States, being first duly sworn, testified as follows:

Direct Examination

By Mr. Ramsey:

Q. Mr. Halverson, you are a practicing attorney with offices in Yakima, Washington?

A. Yes.

Q. How long have you been admitted to practice in the State of Washington? [115]

A. Since June, 1927.

Q. Have you practiced in any other state other than the State of Washington?

A. No, all my practice, outside of Federal Court practice——

Q. Well, I mean by that, you did not practice prior to 1927?

A. No, I started here, and I'm still here.

Q. Has a considerable portion of your practice been in the Federal Courts?

(Testimony of C. W. Halverson.)

A. Yes, I would say that—well, by a considerable portion I wouldn't put more than 50 per cent, but I've had considerable experience in Federal Court practice, and considerable cases.

Q. What offices have you held or do you now hold with the local, state or federal bar organizations and associations?

A. Well, I'm a member of the Yakima County Bar Association, Washington Bar Association, and the American Bar Association.

Q. You have heard the testimony introduced here as to the nature and character of the work done by Moulton & Powell and Mr. Cheadle in connection with the case entitled United States vs. Clements P. Alberts, particularly under declaration of taking 99, which had to do with the properties of the Priest Rapids Irrigation District?

A. Yes.

Q. Have you made any examination of the record in that case? [116]

A. Yes.

Q. And what has been the nature and extent of that examination?

A. Well, I've looked over the transcript of the record, some 1200 pages, the briefs, and the opinion of the Circuit Court.

Q. The transcript of record, of course, contained all the pleadings and various things in connection with the case?

A. Yes, it did.

Q. You heard the testimony as to the length of time that was consumed in the trial of the case?

A. Yes.

(Testimony of C. W. Halverson.)

Q. I hand you, Mr. Halverson, petitioner's Exhibits 1 and 9, and ask you to examine first petitioner's Exhibit 1—no, that's petitioner's Exhibit 9.

The Court: While I think of it, I haven't examined these documents that show the payment of the \$2,000.00 fee to Moulton & Powell. It runs in my mind that somewhere I saw there was some arrangement that a thousand of that was to be paid in warrants of the District. Was it paid in cash as shown by the exhibits that you have in evidence here?

Mr. Powell: No, it was paid by warrants, but I think it may have been that one of the warrants may have been drawn on a fund where there was cash. It was all [117] paid by warrants.

The Court: I got the impression somewhere that part of that was paid in warrants for which there wasn't funds immediately available. I just wanted to clear up that point in my mind.

Mr. Powell: Well, we've received it, your Honor. I don't know how, now, it was paid.

The Court: Well, that's the important thing.

Direct Examination

(Continued)

Q. I presume, Mr. Halverson, that in your practice, as in the practice of most attorneys, some considerable portion of your practice is on the basis of a contingent fee? A. Yes, it is.

Q. Now, if in this particular case the District claimed compensation to the extent of \$1,060,685.00,

(Testimony of C. W. Halverson.)

and in the light of the contract of October, 1943, would you or would you not say that the contract numbered petitioner's Exhibit 1 was a fair and a reasonable contract?

Mr. Powell: Your Honor please, may I object for the record, because I think counsel is asking him the question now as to whether the contingent fee contract is proper in the light of Exhibit 9, the fixed fee contract, which would call for a judicial interpretation or a legal interpretation of the two documents, which I think is up to the Court rather than the witness. [118]

Mr. Ramsey: If the Court please——

The Court: I think I might save time, I think the government is entitled to present evidence on its theory, and the Court will decide which theory to adopt afterward. Your objection will stand, of course, and I'll overrule it.

A. Would you read the question, please?

(Whereupon, the reporter read the pending question.)

A. Well, as I understand the question, are you asking me whether this contract of October, 1943, would be a fair and reasonable contract on a quantum meruit basis for services, or are you asking me whether I would think this contract was fair and reasonable?

Q. No, I don't think you understand the question, Mr. Halverson. Bearing in mind this contract,

(Testimony of C. W. Halverson.)

being petitioner's Exhibit 9, or the October contract, which provides for payment of a fee of \$2,000.00 which the testimony shows has been paid, and advance costs of \$750.00 which the testimony shows has been paid, and bearing in mind that the contract of 1946, which is petitioner's Exhibit 1, covers a claim by the District of \$1,060,685.00, would you say that this contract, being petitioner's Exhibit 1, was a fair and reasonable contract?

A. No, I would not say that.

Q. Would you say that the contract was excessive? [119] A. I would.

Mr. Powell: I don't think I got that last question.

The Court: He was asked if he would say it was excessive, and he said yes.

Q. (By Mr. Ramsey): Now, Mr. Halverson, I'll ask you first, on the basis of quantum meruit, what would you say was a reasonable fee, contingent fee, to be allowed in this proceeding?

Mr. Powell: Now, if your Honor please, I don't think counsel can ask him two questions in one; if it's a contingent fee then it would not be on the basis of quantum meruit, as I understand it.

The Court: As I understand the question Mr. Ramsey is now asking the witness to disregard the contract and say what a reasonable fee would be.

Mr. Ramsey: I think counsel's objection is well taken.

Q. (By Mr. Ramsey): In your opinion, based

(Testimony of C. W. Halverson.)

upon quantum meruit, what would you say would be a reasonable fee to be allowed petitioners in this proceeding?

Mr. Powell: Object as immaterial.

Mr. Ramsey: In the argument of this case predicated upon law which I think squarely applies in this case, it will be the position of the government that at the very best, the petitioners here can only expect to be compensated on the basis of reasonable attorney fees. [120]

The Court: I'm not sure that I recall that in reading your brief, but if that is one of your theories which you intend to urge, I think you should be permitted to interrogate along that line. That doesn't mean that I'm adopting the theory, but I'm merely permitting the proof to be offered to support the theory. Will you read the question, please?

(Whereupon, the reporter read the pending question.)

A. By that you mean, Mr. Ramsey, not only the proceedings in the trial court, but through the appellate court?

Q. Yes, the appeal too.

A. I would say \$25,000.00, in my opinion.

Q. Now, bearing in mind that this is a contingent fee, contingent upon the petitioners making a recovery in the case, but aside from any contract which may have been entered into between the

(Testimony of C. W. Halverson.)

petitioners and the Priest Rapids Irrigation District, what would you say would be a reasonable fee?

A. Well, as I would consider it, based upon a contingent fee basis, it would be my thought that a reasonable contingent fee contract in my understanding under the canons of professional ethics that any contingent fee contract is subject to reasonableness and subject to the approval of the court as to reasonableness, I would feel that as to the first, say, \$30,000.00 of recovery, a third of that amount; [121] I would say as to the next \$20,000.00, I would say 25 per cent, and to the balance over that I would say 5 per cent. In other words, my way of figuring it would be much less than putting the breaking point at \$100,000.00 on the thing. I would break it before that point, considerably, and would think that the basis that I've outlined would have been a fair basis on which an attorney could have handled that.

Mr. Ramsey: You may cross-examine.

The Court: Have you figured out what that would amount to in dollars and cents in this particular case?

A. Well, I don't know the exact amount; it runs in my mind that over and above the \$170,000.00 which was admitted in the case, the recovery was around some, I believe four hundred or four hundred twenty thousand dollars in addition.

Mr. Ramsey: With interest.

(Testimony of C. W. Halverson.)

The Court: With interest, yes.

A. And I didn't compute it out.

The Court: Well, that's all right, that isn't necessary; I wasn't just sure that I got the basis that you stated; you said 25 per cent up to \$30,000.00?

A. No, I said a third of the first \$30,000.00, then I would say the next break would be up to \$50,000.00, from \$30,000.00 to \$50,000.00 I would say 25 per cent, then I would say 5 per [122] cent over that amount.

The Court: I see. All right, you may cross-examine.

Cross-Examination

By Mr. Powell:

Q. The computation gives you a contingent fee of only about \$32,500.00, doesn't it, Mr. Halverson?

A. I think around there.

Q. Don't you think the ordinary contingent fee contract would entitle an attorney to more money than a fixed fee contract? A. Yes, certainly.

Q. Did you take into consideration any contingency when you talked about a \$25,000 quantum meruit compensation? A. No.

Q. That would be in the event of a solvent client capable of paying, you would consider the work done might be compensated for fairly on a basis of \$25,000? A. Yes.

(Testimony of C. W. Halverson.)

Q. Assuming the client was solvent and able to pay.

A. Well, I assume that's the case here, if you were successful in your litigation it should be about as solvent as you could find.

Q. Well, of course that's contingent.

A. Well, your right of recovery is contingent.

Q. Well, your right of recovery of any fee is contingent of [123] necessity when your client hasn't any money?

A. Well, Im talking about your right of recovery; on a contingent fee basis as I understand it your client never pays you except out of the amount you may recover in the litigation.

Q. That's correct.

A. My concern on a contingent fee basis is always concerned with the solvency of the defendant, not of the plaintiff.

Q. Well, of course in arriving at a fee of \$25,000 you would fix that as reasonable compensation for the work performed in this particular case assuming that the client was able to pay a fixed fee rather than making it entirely contingent?

A. That's right.

Q. Now, aren't there instances where it is impossible to make a fixed fee contract of that kind, for example, where your client is unable to pay, win, lose or draw.

A. Oh, yes.

Q. In that event isn't of necessity your contract or your fee contingent upon the recovery?

(Testimony of C. W. Halverson.)

A. Yes, necessarily so. It would be based upon, if you have an insolvent plaintiff to proceed with, or one that cannot pay you, necessarily your chance of payment of fee is based upon your recovery. I think also that even though you have a solvent client that to a large extent your [124] quantum meruit fee is based upon your recovery in the case.

Q. Well, all fees of necessity are somewhat based upon the success of the litigation, aren't they?

A. Yes.

Q. That is, every attorney feels that his fee will be somewhat based upon his success?

A. Yes.

Q. Don't you think a spread of \$7,000 in a case this size is rather small?

A. Well, there's one thing that I might add in the contingent fee basis that I outlined, and that would be for the trial of the case in the trial court. Now, as to an appeal, in that case I would say that would have to be—I wouldn't figure a contingent fee on appeal in this case at all; I would say that that would be one that would be more or less negotiated on a reasonable basis. I wouldn't figure that in a case of this type or even in most contingent fee cases where you have been successful in the trial court and you have any substantial amount of money involved, that you would be necessarily entitled to charge a contingent fee basis on appeal unless that contingent fee basis was more or less

(Testimony of C. W. Halverson.)

on a line with a quantum meruit figure on it. That's my reasoning on it, anyway.

Q. Does the Yakima Bar Association have a regular schedule of [125] fees adopted by it.

A. Yes.

Q. Does it include contingent fee contracts?

A. I think it starts with an amount of \$100.00, as I recall, and I think that's all that it refers to, is to contingent fee cases.

Q. In personal injury litigation isn't it customary for lawyers in Yakima to charge 33 $\frac{1}{3}$ per cent of the amount of their recovery right straight through, regardless of amount?

A. Well, that's pretty hard for me to answer because I don't know, those are matters which usually aren't discussed too much; I could only answer in my own case, and I'd say no, it isn't in my own case. When I am fixing a fee I have a schedule of settlement before complaint is filed, settlement after complaint is filed, or after judgment is obtained, and I don't think that—of course, then again you've got amount involved. If it's a matter of \$250.00 that's one thing; if it's a matter of \$25,000 that's another. I don't mean to indicate that I'm going to take a small claim of \$250.00 and handle it on a contingent fee basis for 20 per cent if settlement is made.

Q. The schedule you referred to is 20 per cent in the event of settlement before suit?

A. Well, now, I don't think that those—those figures I'm [126] giving you now are my figures.

(Testimony of C. W. Halverson.)

Q. You don't know whether they correspond to the general practice in Yakima?

A. I can't say whether they do or not, no. I don't know.

Q. But in your opinion the figures you're about to give us would be fair figures in a personal injury action, is that correct?

A. Well, those that I have just given you, yes, your ordinary personal injury case, which would probably run, oh, three, four, five thousand dollars.

Q. What would those percentages be? I don't think you've given them.

A. Well, usually 20 per cent if a settlement is made before suit is started; 25 per cent after suit is started, and $33\frac{1}{3}$ per cent after trial.

Mr. Powell: That's all.

Redirect Examination

By Mr. Ramsey:

Q. Your schedule of percentages there would vary considerably in relation to the size of the claim, wouldn't it? A. Yes.

Q. Would you expect to charge the same percentage on a claim of one million dollars that you would on a claim of \$2,000 or \$5,000?

A. No, absolutely not, any more than you would expect a \$5,000 estate comparable to a million dollar estate, no. [127]

Mr. Ramsey: I think that's all.

(Whereupon, the witness was excused.)

ELWOOD HUTCHESON,

called as a witness on behalf of the petitioner
United States, being first duly sworn, testified as
follows:

Direct Examination

By Mr. Ramsey:

Q. Mr. Hutcheson, you are a member of the bar
of the State of Washington. A. Yes.

Q. And maintain offices in Yakima, Washington?

A. Yes.

Q. How long have you been engaged in the prac-
tice of law?

A. Since June, 1925.

Q. Is any considerable portion of your practice
in Federal Court? A. Yes.

Q. And roughly, what would you estimate the
percentage of your total practice—what per cent of
your total practice is Federal court practice?

A. Oh, that would be hard to say; undoubtedly
most of it is state court practice; possibly 10 per
cent; that's just a very rough guess.

Q. What memberships do you hold in bar asso-
ciations or organizations?

A. I'm a member of the Yakima County Bar
Association, Washington [128] State Bar Associa-
tion, and American Bar Association.

Q. What was the last?

A. And the American Bar Association.

Q. What offices, if any, have you held in those
associations?

A. I've been member of several committees at

(Testimony of Elwood Hutcheson.)

different times. At the present time I'm a member of the State Board of Bar Examiners of the State of Washington, and have been since March, 1946.

Q. Mr. Hutcheson, does a portion of your practice consist of contingent fee cases?

A. Yes, to some extent.

Q. You have heard the testimony with regard to the character and volume of work done by the petitioners in this case in connection with civil number 128, United States vs. Alberts, under declaration of taking 99, being the properties of the Priest Rapids Irrigation District? A. Yes.

Q. Have you examined the records in regard to the case?

A. Yes, I have read the briefs on appeal of both parties, the decisions of the various courts, and looked through the transcript of record, and I've also examined the two contracts, exhibits here.

Q. Now Mr. Hutcheson, bearing in mind the contract of October, 1943, being petitioner's Exhibit 9, and having [129] also in mind that the total compensation claimed by the District in this proceeding was in excess of one million dollars, would you or would you not say that the contract entered into in 1946 between the District and the petitioners, and being petitioner's Exhibit 1, is a fair and reasonable contract?

Mr. Powell: Now, if your Honor please, may we object again on the same ground, that it calls for a legal conclusion of the witness.

The Court: Overruled; you may answer.

(Testimony of Elwood Hutcheson.)

A. No, I would say that in my personal opinion that would not be a fair and reasonable contract.

Q. Is it your opinion that the contract is excessive?

A. Yes, in my opinion that is excessive.

Q. Mr. Hutcheson, based upon quantum meruit, what would you say would constitute a reasonable attorney fee to be paid to these petitioners for their services in connection with this case?

Mr. Powell: May I object again, your Honor?

The Court: Yes. Overruled.

A. My opinion would be \$25,000 would be on a quantum meruit basis reasonable compensation for their services.

Q. On a contingent fee basis, but aside from the contracts, in your opinion what would be a reasonable basis for compensation? [130]

A. Well, for a larger amount such as this, in my opinion the percentage rate should not be as much as it otherwise would be. In answer to that I would express my opinion that a fair arrangement on a contingent fee basis would be 20 per cent of the first \$100,000 in excess of the \$170,000 undisputed, plus 5 per cent of anything over and above \$100,000 in addition to the \$170,000.

Mr. Ramsey: You may cross-examine.

Cross-Examination

By Mr. Powell:

Q. Your quantum meruit figure of \$25,000, Mr. Hutcheson, implies a fee not paid on any contingency, is that right? A. That's right.

(Testimony of Elwood Hutcheson.)

Q. And a fee that would be paid by a solvent client? A. Yes.

Q. Now, your contingent fee schedule provides for approximately, on the recovery here, approximately \$35,000? A. I believe that's right.

Q. Isn't it customary, Mr. Hutcheson, to have a larger spread than that, or approximately a 30 per cent spread, between a contingent fee and fixed fee contract?

A. Frankly I don't know of any custom as to that particular point at all. Naturally on a contingent fee basis in the event of a victory the recovery would ordinarily be more than on a quantum meruit basis.

Q. And ordinarily it is recognized, is it not, in the practice [131] of la win Yakima and this vicinity, that a client may make a fair contingent fee contract in any manner he sees fit? That is, it isn't unusual, is it, to find clients making contracts for 50 per cent contingent fees?

A. That's sometimes done. Frankly it always seemed to me 50 per cent was too much, but I've heard of such instances. I don't think it's done very often for that large a percentage.

Q. And certainly not for a large amount of money, is it?

A. That's right, for a large amount of money that would be definitely excessive.

Q. You have heard Mr. Halverson's testimony as to his customary practice with reference to contingent fees in personal injury cases?

(Testimony of Elwood Hutcheson.)

A. Yes, if I understood him correctly that would be my usual experience, that is, 20 per cent if settled before commencement of suit, 25 per cent if settled after commencement but before trial, and after trial 33 $\frac{1}{3}$ per cent. That's the basis that I go on in personal injury suits, which of course never involve any large amounts such as this litigation.

Q. Then there would be no sliding scale in a case of that kind, would there?

A. According to the amounts?

Q. Yes. [132] A. No, there would not be.

Q. So if you had a contract like that on a personal injury case and received a recovery of about \$100,000 your recovery would be as much or more as it would on the million dollar recovery here, wouldn't it, or the \$400,000 recovery, I mean?

A. What would be the amount of recovery, you mean?

Q. In the event of recovery of \$100,000 in a personal injury case.

A. The fee then after trial would be \$33,333. I never heard of such a large recovery in a personal injury case.

Q. The court mentioned one in Los Angeles the other day.

A. I don't believe that ever happened in the state of Washington so far as I know.

Q. Are the contingent fee percentages you mentioned for the trial work, Mr. Hutcheson, that would be in the trial court?

(Testimony of Elwood Hutcheson.)

A. You refer to the personal injury cases?

Q. No, I'm referring to the contingent fee schedule or percentages you mentioned as being in your opinion fair in this case, 20 per cent for the first hundred thousand dollars and 5 per cent for all over that.

A. Well, that's on the assumption of going to trial and an appeal.

Q. And going through the appeal also? [133]

A. Yes. It would be my personal opinion that in litigation that important an appeal would be almost a certainty; that is the reason for saying that.

Q. And that would be assuming, of course, that the client would pay all of the expenses also?

A. Oh, yes.

Mr. Powell: That's all.

Redirect Examination

By Mr. Ramsey:

Q. Now, Mr. Hutcheson, speaking about this spread, if the District had recovered more than one million dollars that they sought in this proceeding there would have been a considerable spread between \$25,000 and the amount that would have been paid under the contingent fee that you mentioned?

A. Yes, very definitely so.

Mr. Ramsey: I think that's all.

(Whereupon the witness was excused.)

Mr. Ramsey: The government rests.

JOHN GAVIN

called as a witness on behalf of the petitioning attorneys, in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Powell:

Q. Your name is John Gavin? A. Yes, sir.

Q. And you are a resident and practicing lawyer in Yakima, [134] Washington?

A. That's right.

Q. Do you hold memberships in the local bar association?

A. Yakima County Bar Association, Washington State Bar Association, and American Bar Association.

Q. You are now a member of the Board of Governors of the State of Washington Bar Association? A. That's right.

Q. Mr. Gavin, you have been president of the local bar association? A. Yes, sir.

Q. And state if you will, please, the customary schedule of fees, contingent fees, in Yakima and vicinity as recognized by the Yakima County Bar Association?

A. The Yakima County Bar Association maintains a printed minimum fee schedule which was adopted by it and is now in effect. It is my recollection, I do not have it before me, but I think I can state that it calls for, on contingent fee arrangements for all recoveries in excess of \$100.00 after

(Testimony of John Gavin.)

litigation, after suit, one-third of the recovery. I believe it provides for either 20 or 25 per cent of the recovery in the event settlement is effected prior to trial. Amounts under \$100.00 are subject to other arrangements.

Q. Does that apply solely to personal [135] injury litigation?

A. That applies to all litigation; it is not confined to personal injury litigation. Of course, personal injury litigation constitutes the bulk of the contingent fee arrangements, but it's not confined to it.

Q. And is there any adjustment of the percentages on appeal?

A. I don't believe in the schedule; I believe it's customary for attorneys charging on a contingent basis to increase the one-third to 40 per cent in the event of appeal in contingent cases.

Q. You've heard the question asked Mr. Hutcheson and Mr. Halverson in reference to the two contracts, Exhibits 1 and 9. Are you familiar with the contracts?

A. I have read two contracts. I can't identify them by Exhibits 1 and 9, however. Petitioner's 1, then, is the contingent contract of August 30, and 9 is a contract of October 30, 1943. Yes, I have read these two instruments.

Q. Having in mind the fixed fee contract of October, 1943, would the contingent fee contract of August, 1946, in your opinion be a fair and reasonable contingent fee contract?

(Testimony of John Gavin.)

A. Taking the contingent fee contract, which is Exhibit 1, and examining it in the light of what information I have about this matter, it is my opinion that the percentages set forth in there are fair and reasonable.

Mr. Powell: That's all. Any questions?

Mr. Ramsey: No. [136]

(Whereupon, the witness was excused.)

Mr. Powell: That's all we have, your Honor.

The Court: Do you rest, then?

Mr. Powell: Yes.

The Court: Do you have anything further?

Mr. Ramsey: No.

The Court: I appreciate that this is a matter of considerable importance both to the petitioners and the government, and there are a number of vexing questions involved here, and I assume that counsel will wish to argue at some length, although you may assume that I have read your briefs and points and authorities here. Of course, the difficulty about that is that the principal issues as I see it are raised by the government's objection to this petition, and I assume probably that there was no time and opportunity for the petitioners to answer the government's brief, so that on those points that the government raises, some of them, I have so far heard only one side of the argument, naturally, because there was no reply or answering brief to those matters. I'm willing to allow counsel any-

thing within reason so far as argument is concerned. Do you think an hour on a side would be sufficient?

Mr. Ramsey: I would think so.

The Court: I'm not inclined to limit you; [137] I have nothing else today, and I'm not going to try to get back to Spokane now, but I thought it best to have some time limit there so we'll know what time we're going to get through. We'll recess, then, until 1:30, and each of you may have an hour on a side and divide it as you wish between opening and closing. I think perhaps the most orderly procedure would be to have Mr. Ramsey open and the petitioners answer, if there's no objection to that, because as I say, the thing that primarily concerns me are the objections raised by the government. In the absence of those objections I should be inclined to grant the petition, of course. Does anybody object to that arrangement? All right, we'll recess until 1:30.

(Noon recess.)

Mr. Ramsey: May it please the Court, in this proceeding it seems to me that the first question which should be considered is whether or not the compensation should be upon the basis of the contract entered into between the petitioners and the de facto directors of the District in the year of 1946. Now, there are a number of factors relating to the conditions under which this contract was entered into, the earlier relationship of the parties, and numerous other things that necessarily must be

considered in reaching a conclusion on that point in addition to the law which may apply.

Prior to 1943 for some seven years, as testified to by Mr. Powell, the firm of Moulton & Powell were the attorneys [138] for the Priest Rapids Irrigation District, handled all of their legal affairs, and were receiving a monthly sum by way of retainer. In 1943, on the 30th of October, according to the date upon the instrument, Moulton & Powell and the District entered into a contract relative to attorney fees to be paid to the firm of Moulton & Powell for representing the District in this condemnation proceeding. In February of 1943 the petition in condemnation had been filed and immediately thereafter an order of possession had been entered.

Following that, as has appeared from the statement of witnesses here, numerous conferences were held between the attorneys for the District, the attorneys for the government, and the Court, the attorneys for the District appearing also in many of those instances for individual clients. Before the date of this document, this first contract, all the parties knew that the government intended to file declarations of taking covering all the property in the District that hadn't been acquired by direct purchase, including the properties of the Irrigation District. They also knew exactly what the position of the government was in this case, and specifically the position of the government with regard to its contention that by acquiring all of the privately owned lands within the District it would, as the

ultimate beneficiary of the trust, be entitled to take the property of the District without payment of compensation other than might be necessary to retire the obligations [139] of the District, this of course being predicated upon the ultimate dissolution of the District, the position of the government that, being the owners of the land, under the rule *In Re Horse Heaven* that it took with the land all beneficial interest in the property to which the legal title was held by the District, and that there remained nothing more for the government to take from the District than the naked legal title not coupled with any beneficial interest, which was already held by the government.

Now, those things had been discussed and were thoroughly understood. On October 30, 1943, the District entered into this contract with the firm of Moulton & Powell. I assume that the contract was drawn by Moulton & Powell. They were the attorneys for the District, and apparently they had no other attorneys. Certainly it was signed by Moulton & Powell, by M. M. Moulton, and the Court will take judicial knowledge of the fact that the firm of Moulton & Powell was a very competent firm of attorneys; unquestionably they knew the content of the contract, they knew exactly what the contract provided. There was no fraud perpetrated upon them. It was a contract which, as I say, I assume they drew themselves because I can't reach any other logical conclusion; certainly they knew the contents of it, they signed it, and expected to be and were bound by it.

Now, this contract provided "District has pursuant to [140] resolution heretofore passed by the Board of Directors employed Moulton & Powell to represent the District in all matters in which the District may be interested or concerned in the proceedings brought by the United States for the condemnation of lands within the District, of which a large area is owned by the District" and I might say with reference to that, that that land other than the land which had to do with the power site and the pumping plants, the large area which reached nearly 10,000 acres was acquired by the government through stipulation; it was not involved at any time in this controversy; "and to represent the District in all matters in connection with said proceeding in which the District as a whole may be involved. As compensation for their services rendered in connection with said litigation, the sum of \$2000.00 is to be paid at this time. It is further understood by District that in the rendition of said services it has been necessary and will be necessary for attorneys to incur expenses on behalf of the District in a substantial amount and District now agrees to pay to attorneys \$750.00 at this time to be used by attorneys in the payment of expenses necessarily incurred in said litigation and not otherwise. Attorneys agree to render to District all legal services necessary in the protection of District's interest as a property owner in the District and as the owner of District instrumentalities being taken by the government and to employ such additional

counsel as will be necessary, at their own [141] expense. Attorneys further agree that they will use the aforesaid amount of \$750.00 for the payment of expenses heretofore incurred and to be incurred in handling the litigation referred to herein and not otherwise, and that they will account to District for all expenditures made by them on account of such expenses. Attorneys further agree that they will accept the aforesaid amount of \$2000.00 as full compensation for all services rendered by them as well as services to be rendered by them in connection with said litigation except that in the event that services not heretofore contemplated shall be required of attorneys, such additional compensation will be paid as the board of directors of District may deem proper and not otherwise."

Now, that contract is perfectly plain, readily understandable. On October 30, 1943, I want to reiterate that the attorneys and the District knew exactly what the situation was with reference to this condemnation proceeding and exactly what the position of the government was with regard to the District properties, and certainly knew that there was bound to be litigation on that point, since they were not at all in agreement with the position of the government, and I think we may safely assume that they also knew there would be an appeal, because the question was a large one; it involved on the one hand the claim of the District for more than a million dollars; on the other hand the claim of the government that they were not [142] obligated to

pay any additional sum over and above the sum paid for taking care of the obligations of the District, and with all of that knowledge in mind Moulton & Powell agreed under the contract to represent the District in all matters in which the District may be interested or concerned in the proceedings brought by the United States for the condemnation of land within the District of which a large area is owned by the District, and to represent the District in all matters in connection with said proceedings in which the property of the District as a whole may be involved, and there's no limitations; "Attorneys agree to render to District all legal services necessary in the protection of District's interest as a property owner in the District and as the owner of District instrumentalities being taken by the government and to employ such additional counsel as will be necessary, at their own expense."

Now, that's what Moulton & Powell agreed to do, and I hardly think it's necessary for me to argue with this court that Moulton & Powell knew perfectly well what their obligations were under that contract. "Attorneys further agree that they will accept the aforesaid amount of \$2000.00 as full compensation for all services rendered by them as well as services to be rendered by them in connection with said litigation except that in the event that services not heretofore contemplated shall be required of attorneys, such additional compensation will be paid as the board of directors of District may deem proper [143] and not otherwise."

In other words, so far as Moulton & Powell were concerned that payment of \$2000.00 was accepted in full as compensation for services rendered and to be rendered in connection with this matter. They left a loophole that if there were services to be rendered not within the contemplation of the parties, and I can only read from that services that you couldn't ordinarily foresee would grow out of this condemnation proceedings, then in such case additional compensation will be paid as the board of directors may deem proper, and not otherwise.

The Court: Of course, I wasn't in this litigation in its early stages, as you know, Mr. Ramsey, but I was just wondering if my impression is correct, that at the time this first contract was made and for some time after that, that it was the—I don't know whether it was the theory of the government people, but it was the theory of the land owners and their attorneys that they were to offer proof in the condemnation of the individual tracts or the privately owned tracts, they were to offer proof of the value of all of the assets of the District including what we call non-irrigation as well as irrigation assets, and have the court instruct that they were entitled to recover their pro rata share of that value. Now, if that theory had been adopted by Judge Schwellenbach and he had permitted that proof and so instructed the jury in each case, then there wouldn't have been any real controversy or [144] real lawsuit between the District and the government as to the acquisition of the assets.

Mr. Ramsey: As to the acquisition of the irrigation assets, if the court please.

The Court: No, I don't know whether I made myself clear or not; I thought at first the land owners endeavored to show the value of all of the assets of the District, power plant and everything else.

Mr. Ramsey: That's right.

The Court: And if Judge Schwellenbach had permitted that and instructed the jury each land owner was entitled to recover his pro rata share, then the landowners would have recovered that value piecemeal, and there wouldn't have been any controversy between the District and the government, in that case.

Mr. Ramsey: Well, that presents a novel question to me; I don't know whether that would have precluded the District from taking the position they were to be paid for their non-irrigation assets, or not.

The Court: I don't know on what basis they could, logical basis, if it had already been covered in in the distribution to the land owners; but I don't want to get you off of your train of thought.

Mr. Ramsey: Well, I'm very glad to have that called to my attention. Now, I don't remember the exact date that this matter was first taken up before Judge Schwellenbach, nor the [145] exact date on which Judge Schwellenbach indicated that it was his intention not to allow that to be shown in the trial of the individual cases, but to permit all parties to

make a record in the first cases tried so that the matter could be immediately taken to the Circuit Court of Appeals and determined as to whether those individual land owners had a right to make that showing. However, I find from the attached list of expenses on the—I hardly know what you'd call that instrument, itemized statement, I suppose, on the petition for expenses, that included is a list of expenses in trial of condemnations in October. Now, all of these that are dated appear to be in 1943; I don't know the date of those first cases, do you, Mr. Powell?

Mr. Powell: October, 1943.

Mr. Ramsey: They were tried?

Mr. Powell: Yes.

The Court: That's the expense account that's in evidence here?

Mr. Ramsey: Well, it will be up before the Court a little later on allowance of expenses.

The Clerk: It's attached to the petition for payment of expenses.

The Court: Oh, yes, I remember it now. Go ahead.

Mr. Ramsey: Sometime during the month of October these so-called first test cases were tried. At that time the [146] District and the firm of Moulton & Powell had full knowledge of the position that Judge Schwollenbach was taking in this case; they had full knowledge of the position the government was taking in this case; they had asserted in full the position that the District was going to take in this case, and all of that was known to the con-

tracting parties on the 30th day of October when they entered into this contract, so if it's a question of these various questions which arose in that matter not being known to the contracting parties, they were thoroughly known at the time that they entered into the contract. They knew that these issues were involved.

Now, let me say this: I think that the District certainly made a very good contract with Moulton & Powell in this matter in 1943. If the services of such attorneys could be secured for the work that was very plainly impending for the sum of \$2000.00, then the District made a very good contract and is to be congratulated. Nevertheless, they made it, and Moulton & Powell agreed to it, and Moulton & Powell signed the contract. There is a loophole, "except that in the event that services not heretofore contemplated." I don't know what they could have been; every issue involved here had been fully set out and developed at the time this contract was made and entered into, but "in the event that services not heretofore contemplated shall be required of attorneys, such additional compensation will be paid as the board of directors of District may [147] deem proper and not otherwise." If the board of directors had chosen to stand upon this contract, and told Moulton & Powell "You're not entitled to any further compensation here" frankly I don't know how in the world Moulton & Powell could have expected to collect another dime, in the face of this contract.

However, in 1946 the government was the owner of all the land in the District. It was very apparent that any sums that might be spent by the District wasn't going to be paid by the original land owners through assessments upon the land. They perhaps felt more generous at that time. At least, they felt generous enough so that in the face of that contract they entered into this contract agreeing to pay a contingent attorney fee which actually in this case runs to nearly \$79,000, and could have, if the District had prevailed in their claim for the full amount, have run to more than \$150,000, which most anyone will agree is a pretty fair additional compensation for additional work done under a contract providing for the payment of \$2,000 in all.

I submit to the Court that this contract was a most improvident contract to be entered into by the de facto board of directors of the Priest Rapids Irrigation District. The Priest Rapids Irrigation District had ceased to function as a district back in 1943. The de facto directors of that District were functioning purely in the position of trustees for the ultimate beneficiaries of the trust. Under those [148] circumstances, certainly under the law, they were required to forget their generosity and concentrate upon the preservation of the trust in their hands.

In August, or prior to the first day of August, 1946, in the case of C. I. Wright et ux and et al vs. Harley E. Chapman, being case No. 8035 in the Superior Court of the State of Washington for the county of Benton, the de facto board of directors

in that case prayed the Superior Court of the State of Washington for the county of Benton to take jurisdiction of the trust of which, under the laws of the state of Washington, the Priest Rapids Irrigation District is a trustee; "decree that this court retain jurisdiction of this matter for further appropriate supervision of the administration of said trust, and for further appropriate proceedings directed toward the dissolution of the Priest Rapids Irrigation District and the distribution of the corpus of the trust." On August 1 of 1946 Judge Paul entered a decree in this case decreeing that this court retains jurisdiction of this cause for appropriate supervision of the administration of said irrigation district and for further appropriate proceedings directed toward the dissolution of said district and distribution of the assets of said district.

Now, without conceding, because the government doesn't concede that Judge Paul could have taken jurisdiction of further proceedings looking toward the dissolution of the district in a [149] case to which the government was not a party and at a time many, well, at least three or four years prior to the time that that dissolution proceeding was brought under the statutory law of the state of Washington, nor does the government concede that he could bar anyone else other than the de facto board of directors of the District from initiating proceedings for the dissolution of the District, nevertheless the de facto directors of this District did go into that court, did ask that court to assume supervisory

powers over the administration of the affairs of the Priest Rapids Irrigation District, and the court by its decree did decree that he was taking supervisory powers over the administration of the affairs of the Priest Rapids Irrigation District. Now, bear that in mind. I hold in my hand the canons of professional ethics, canons of judicial ethics, adopted by the American Bar Association, and I note on the face of that, Washington Bar Association; the code of ethics of the American Bar Association shall be the standard of ethics for members of the bars of this state, citation Laws of Washington 1921, chapter 126, section 15, R. R. S. of Washington Section 139-15, Washington State Bar Association, Executive Office, 501 Third Avenue, Seattle, Washington. Page 9: "Contingent fees; a contract for a contingent fee where sanction by law should be reasonable under all the circumstances of the case including the risk and uncertainty of the compensation, but should always be subject [150] to the supervision of a court as to its reasonableness." That's Section 13, page 9.

In addition to that provision of the canons of professional ethics adopted by the state of Washington by statutory enactment, the de facto directors of the District in this case had gone into a Superior Court of this state and asked that Superior Court to take over supervision of the further administration of the affairs of the Priest Rapids Irrigation District, and the court had attempted to do that very thing, but they didn't take this contract into the court to be approved; they didn't submit it to the

very court that they had prayed to take supervision of the further administration of the affairs of the District and submit it to that court for determination as to its reasonableness, before the services were rendered, neither did they come into this court and submit that contract for approval by this court prior to the time the services were rendered. No one knew anything about that contract, so far as I know, prior to the time that the determination of the Circuit Court of Appeals came down in this case, except the contracting parties themselves.

Now, in all of the circumstances, in view of the fact that these *de facto* directors of the District were actually acting as trustees of a trust fund, in view of the fact that the canon of ethics adopted by this state says that these contingent fee contracts should be—let me use the exact words, I don't want [151] to misquote it—"subject to the supervision of a court as to its reasonableness;" in view of the fact that they had already gone into the state court of the state of Washington and asked for supervision of the further administration of the affairs of the District, by what conceivable process of reasoning could they have felt that the obligating of the District for what might amount to \$150,000, which actually does amount to nearly \$79,000, was a matter of such small moment that it didn't need to be passed upon by anyone as to its reasonableness?

I submit to the Court that this contract of 1946 should not for one moment be considered as a basis

for compensation to be paid to the attorneys in this case. It's a most improvident contract. It's one that the board of directors couldn't possibly justify in the light of the earlier contract. It almost amounts to a gratuity or a gift from the board of directors to the attorneys. They deliberately withheld that contract from the court that they had asked to supervise the further administration of the matters of the District, although it involved a bigger amount of money than they had probably ever had to deal with before in the whose history of the District, in one transaction. They withheld it from that court, they didn't ask his approval; they didn't ask his opinion; they didn't ask him to fix a reasonable amount to be allowed; no, they withheld this contract and held it in the files; they didn't come before this court and submit that [152] contract as to whether it was a reasonable contract or not. The whole conduct of the de facto board of directors in this matter is certainly open to suspicion and censure.

Futher than that, I submit to the court that as a matter of law compensation to these attorneys cannot be based upon the contract with the de facto directors of the Priest Rapids Irrigation District. It's a well established rule of law that wherever a trust fund is brought into court through the activities of a party litigant where others than the parties litigant benefit thereby, that the compensation in such a case cannot be predicted upon a contractual relationship between the attorneys and the litigant who appears for himself and others, or appears for

the benefit of himself or/and others, or appears for the benefit of others, that for the reason that the attorney fee would be impressed as a lien upon the trust fund brought into court, and the other parties benefiting were not a party to the contract between the litigating party and the attorneys. Now, on that matter I don't think there can be any real question that this is a trust fund, and that the recovery by the District as a litigating party was for the ultimate benefit of the beneficiaries of the trust. I quote from the opinion of the Circuit Court of Appeals of the Ninth Circuit in this very case. On page 12 and 13 of that opinion appears the following:

“Judge Schwellenbach faced the fact that in the instant case [153] the claimant (the District) appeared in the status of a statutory trustee for these former District land owners, and as such trustee was asserting its right under law to recover for beneficiaries of the trust a second compensation for property considered in the previous trials, i.e., the value of District facilities as irrigation facilities, which was in turn reflected in the value of the land. The fact that this particular claim for compensation for these irrigation facilities was asserted by a trustee in its representative capacity rather than by the ultimate beneficiaries of the trust, did not disguise the fundamental fact that it was in reality a demand for compensation for an element of property value for which just compensation had already been paid. We think that the Court looked through the form to get at the substance of the claim, and

that it did not err in regarding it as an effort to secure double compensation.”

“Judge Driver was also aware that upon completion of the pending District disorganization proceedings in the State court, the proceeds of such a recovery, if authorized here, could not be retained by the District (it would pass out of existence) but would be delivered over to those entitled under State law to receive them. This situation led the Government to assert that in any event its present ownership of all of the lands in the District made it, [154] in effect, the real beneficiary of the trust. It may be assumed that Judge Schwellenbach so regarded this particular aspect of the case, and we think that he reached a rational conclusion.”

The Circuit Court of Appeals, Judge Schwellenbach, and I think your Honor all recognized the fact that the Priest Rapids Irrigation District ceased to function as a district in 1943, and that it retained its legal status solely as trustee for the ultimate benefit of the beneficiaries at such time as it should be dissolved and its assets distributed. It follows that when the Priest Rapids Irrigation District as a party litigant brought this fund into court, that it brought in a trust fund not for its own benefit, but for the ultimate benefit of the beneficiaries of the trust as determined upon the dissolution of the District.

Now, it might very well be that this would be a good time for the government to reiterate its position that in the distribution of those assets, it is the

beneficiary. That was recognized by the Circuit Court of Appeals in this opinion, quoting from page 17 of that opinion:

“It is certainly clear that as to those land owners, including the District, who sold their lands outright to the government without condemnation proceedings, there could be no legal grounds of their complaining as to the price they obtained. It is only as to those individuals [155] whose land was condemned that any rational grievance can exist, and as to them, their cases are *res judicata* and not again to be inquired into collaterally in a state court dissolution proceeding or any other kind of state court proceeding.”

Judge Denman in his dissenting opinion wrapped it up in a little more terse language, and a little more direct:

“This Court holds that the District corporation is entitled to an award of some \$473,356.00 for its properties condemned to the government. It holds that the District may never be paid these monies, but they shall be paid into court to be held in the District Court for distribution after the conclusion of a state court proceeding for dissolution of the corporation holding such a judgment. Then, if the government still owns all the land, it will be repaid its deposit.”

The Court: Well, I must assume that the Court of Appeals was trying to say that as it appeared under the holding of the *Horse Heaven* case, that the government would recover the money, but in

the final analysis the Superior Court of the State of Washington can qualify or distinguish the Horse Heaven case.

Mr. Ramsey: That's right.

The Court: That's the reason I felt the money should be held here, and the state court determine who the money belongs to. If they held the government was entitled to this money, I [156] don't see why they didn't reverse me and direct that it be turned over to the government. It would be an idle gesture to say that it shall be held here, if it's a foregone conclusion that the government is going to get it back anyway.

Mr. Ramsey: I recognize that this is nothing more than the application by the Circuit Court of Appeals of the *In Re Horse Heaven* case, and for that reason I don't see any reason to burden the court with further citation from the *Horse Heaven* case; Heaven knows it's been cited enough before, but whatever the state court may hold, the fact remains that someone is the ultimate beneficiary, and it will be distributed to others than the party litigant, the District. Of course, if I can convince this court that the government is the ultimate beneficiary, then there is a second rule of law that's very well recognized, that a trustee may not exercise powers granted in a way that is detrimental to the trust. However, I realize this court is not going to attempt to pass upon a question which can only be determined in the distribution of the assets under the dissolution of the District.

Now, the general rule is that in trust funds such as this which are brought into court by one of a class or by one party litigant where the benefits of the trust must go to others or to him and others, then the general rule of law is as I have said, that attorney fees are predicated not on the contract made by the party litigant made with the attorneys, but upon what the [157] court holds to be reasonable attorney fees under all of the circumstances, and I have cited in my memorandum of authorities *Boothe v. Summit Coal Mining Company*; and those fees cannot be on a contingent basis, but are paid on a theory of benefit to the stockholders at large or a particular class generally; *Hutchison Box Board & Paper Company v. Van Horn*, 299 Fed. 424. There are a number of other cases, but I don't think it's necessary to enlarge upon the rule that applies on these trust funds.

The Court: I think I get your point on that, Mr. Ramsey. It is that this is in the nature of a trust fund, and that whoever the state court may ultimately determine to be the beneficiary, it will be either the government or the former land owners at some particular stage of the proceeding here——

Mr. Ramsey: Or some portion of the landowners.

The Court: ——or some portion of the land owners, none of whom are parties to this contract.

Mr. Ramsey: That's right. I have no disposition to attempt to argue to the Court what might constitute a reasonable attorney fee to be allowed in this case if the Court finds that there should be an at-

torney fee allowed in excess of the \$2000 paid under the first contract. I suppose if we'd call into this court a hundred lawyers without any conference between the hundred lawyers, and put them separately on the stand we would elicit a hundred separate and different opinions as to [158] what might constitute a reasonable attorney fee. I recognize the fact that attorneys are very prone to go to the aid of their brothers in the collection of attorney fees, and I find that to be quite right and proper. Difficulties enough are experienced in the collection of attorney fees, and I have no fault to find with any attorney being biased in favor of another attorney in an attempt to collect fees. The court has had the benefit, if it can be called a benefit, of various expert witnesses as to what would constitute a reasonable attorney fee in all of the circumstances here.

I do want to call the Court's attention to one thing, and that is that in allowing attorney fees it isn't necessary, of course, and I know that the Court realizes that, that any witnesses on that point should be called at all.

The Court: Yes, I know.

Mr. Ramsey: The Court, because of his peculiar position and his knowledge of the case and the work involved and the nature and character and amount of it, is probably in the best position of anyone to determine what constitutes a reasonable attorney fee under all the circumstances. If the witnesses are called the court is not bound by their testimony. Still the final conclusion must be his as to what constitutes a reasonable attorney fee, and any witnesses

who may be called are simply for the purpose of giving the court such assistance as their opinions may be to him, if any. There are innumerable [159] cases upon that particular point, but I think the court will recognize that rule of law without any citations. I will be glad to furnish the citations and the statements of the courts if the court desires.

“Questions concerning the amount of fees to be allowed are properly and peculiarly within the knowledge of the judge who has become acquainted with the litigation during the progress of the trial, and in the absence of any showing of an abuse of discretion, the allowance of fees made by him must be affirmed.” *Central Trust Co. vs. United States Lighting and Heating Co.*, 223 Fed. 420.

“And in fixing that amount, the Court may proceed upon its own knowledge of the value of the solicitor’s services.”

That’s the holding in *Harrison vs. Peria*, 168 U.S. 311.

“The Court having personal knowledge of the facts of the case, of the conduct and services of the counsel, and the results achieved by them, may, acting upon this knowledge, properly fix the value of the solicitors services without further evidence or formal testimony as to the amount of services rendered, or their value.”

That’s the holding in *Colley vs. Walcott*, 187 Fed. 595.

I have cited a number of cases and the holdings of the court fixing attorney fees in cases of this sort. Roughly, checking through them, it seemed to me that the courts were applying basically on these larger amounts a 5 per cent rule in [160] allowing attorney fees. In the case of *Brown vs. Pennsylvania Railroad Company*, an allowance of \$200,000 attorney fees on a recovery bringing into court the sum of two million dollars was reduced to \$100,000, which is a straight 5 per cent.

In the case of *McCartney vs. Guardian Trust Co.* 280 Fed. 64, attorney fees of \$15,000 allowed upon the recovery and bringing into court of \$700,000 was increased to \$37,500. In the case of *Edwards vs. Bay City Gas Company*, 172 Fed. 971, an allowance of \$125,000 in attorney fees was approved whereas the result of litigation extending over a period of five years and involving the appointment of a receiver, two million dollars in assets were collected and brought into court. This court isn't bound, of course, by the findings of other courts as to what constitutes reasonable attorney fees.

I think I may properly say this: That while I feel that the court could take the position under this contract of October, 1943, that that is a valid and binding contract, and that all of the services rendered in this proceeding were covered by that contract, that no services were rendered other than those that were contemplated by the parties, and that any additional attorney fees came in the nature of a gratuity from the de facto board of directors of the

District, I shan't urge upon the court that he adopt that position. I certainly have a feeling that the laborer is worthy of his hire. I feel personally that if the court can find a basis for allowance of [161] further attorney fees here that he should do so.

I feel just as strongly that that allowance shouldn't be based upon the supplemental contract of 1946, however. I don't consider that that was a fair contract; I do consider that it was a most improvident contract; I do certainly feel that before that contract, or before these services were performed, that the least that these petitioners and the board of directors of the District could have done was to submit it to a court for approval, and particularly in view of the fact that they had already asked the Superior Court of this state to assume supervisory control of the further matters involved in the Priest Rapids Irrigation District, and that their failure to do so in the face of the plain statement appearing in the canon of ethics adopted by this state on this type of contract leaves them in a rather unenviable position in attempting to rely upon this contract which is first brought to the notice of the court and of the government after all of the services have been performed.

I repeat that I personally feel that the attorneys have not been adequately compensated by the payment of the original \$2000, and I personally feel that attorneys should be allowed a reasonable sum for their services in this proceeding. I don't feel that that allowance should be based upon the con-

tractual relationship between the petitioners and the de facto board of directors, but should be based upon what [162] constitutes reasonable compensation for the services rendered.

The Court: You may proceed.

Mr. Cheadle: The Court wishes me to proceed?

The Court: Yes; are you both going to argue?

Mr. Cheadle: Yes, I think our argument will take less than an hour, though, your Honor.

The Court: Well, I was going to say, suppose that one of you argues, and then we'll take a recess and proceed.

Mr. Cheadle: Very well. May it please the Court, I shall refer first and make rebuttal to Mr. Ramsey, government counsel's, argument. Counsel read I believe verbatim the October 30, 1943, contract, placing his emphasis on words none of which, to be sure, are underlined in the contract itself. I do call the court's attention to certain words in that contract. They are, we submit, very significant in view of documentary evidence and testimony in the record at this hearing. That document states that the District has employed Moulton & Powell pursuant to resolution theretofore passed. It has employed, referring back to the resolution of March 9, 1943, I assume, that being the exhibit number 3 in this hearing. This is not the contract of initial employment of those attorneys. Further, in that first paragraph of the agreement proper, it states "as compensation for their services rendered in connection with said litigation the sum of \$2000 is to be paid at this

time.” As exhibit number 4 shows, the June [163] 10, 1943, minutes state the agreement of the parties, and that \$2000 is to be paid, and as other testimony shows, including the warrants in here, those payments were in fact made substantially before October 30, likewise as regards the \$750.00 payment to be made at this time.

Most significantly, what government counsel has referred to as a loophole, what I submit may properly be considered as a provision which both parties intended, it is stated as a qualification that the \$2000 is to be accepted as full compensation, except that in the event that services not heretofore contemplated shall be required of attorneys, such additional compensation will be paid as the board of directors of the District may deem appropriate, and not otherwise, and again I'll hark back to the statement “\$2000 is to be paid at this time.” No indication that that was the full agreement of the parties all the way through. Furthermore, your Honor, in this hearing there is no evidence whatever before the court excepting evidence which is to the effect that the parties themselves at the time considered that that contract covered the services contemplated and stated in those June 10, 1943, minutes of the District Board, contemplated proceedings up to a condemnation; it was so stated in the words of the District. Obviously a lawyer did not draw those minutes of June 10, 1943.

Mr. Ramsey: Now, just let me understand counsel's position. Is he now arguing that the terms of the written contract [164] should be varied——

Mr. Cheadle: No.

Mr. Ramsey: —by other evidence?

Mr. Cheadle: Mr. Ramsey, your Honor, has placed his own interpretation on what is meant by services not heretofore contemplated by the parties.

The Court: I don't know how much of your time you've used, Mr. Ramsey, but I'll give you an opportunity to answer this argument if you wish.

Mr. Cheadle: Certainly, your Honor, that contract contains nothing in its words, the words of the contract itself, which would explain services not heretofore contemplated, and certainly it would permit the introduction of parol evidence. Mr. Ramsey emphasizes very heavily the August 1 decree of the Benton County court, and makes a point that this contract was not submitted to that court for approval. That court on the petition of the District, I myself was attorney for the District in that proceeding, and for the other plaintiffs, provides that the plaintiffs B. Salvini and J. H. Evett are in fact de facto directors of the District, are——

The Court: Before you leave the other matter, I must confess that I've had considerable difficulty following the proof offered by the petitioners here as to what was within the contemplation of the parties, what the attorneys were to do when this first straight fee contract was entered into. I [165] thought that there was some testimony here that they had in mind services in connection with test cases that were brought to acquire lands of individual land owners down there, but the main condem-

nation case had been brought and was pending when this contract was entered into. The District certainly was included within the perimeter description.

Mr. Cheadle: That is correct.

The Court: And when a landowner, whether it's an irrigation district or an individual, has an action pending against him to acquire his property, and employs an attorney to represent him in that case, it seems to me that means to represent him, and I have a little difficulty figuring out what they did contemplate, taking into consideration the terms of the contract, which I think I must do.

Mr. Cheadle: I can only refer, your Honor, to the testimony, and if I may have, please, Mr. Clerk, the exhibit number 4. In Exhibit 4, which is the minutes of that June 10, 1943 meeting, it states that Moulton & Powell, attorneys for the District, wish to gather certain information for the completion of the brief to be presented to Judge Schwellenbach. This brief was to be presented to the Judge at the same time that the attorneys for the Army Engineers presented theirs. The brief it refers to, to be presented to Judge Schwellenbach, certainly did not speak, your Honor, of many briefs, or of appeals, and the next paragraph reads "A discussion of ways and [166] means of paying the attorney fees to Moulton & Powell was discussed, and it was decided that it would be agreeable to both the District and the attorneys to make a payment of \$1000 in cash and a payment of \$1000 in district warrants, the total amount of \$2000 being the amount required

by Moulton & Powell to prepare the legal requirements of the District up to the time of condemnation proceedings should such a step become necessary."

Mr. Powell did not recall the exact time, but it was in that summer of 1943 that there was a conference, in the nature of a pretrial conference; there was an agreement among court and counsel apparently as to the raising of this question in connection with those test cases, and I submit that Mr. Powell's testimony and Mr. Reiersen's testimony are consistent, the testimony of each of them consistent with this exhibit number 4, and indicates that that initial contract, which after all refers to the precise payments, was for that first stage of the proceeding.

The Court: I know the old axiom that a shoemaker's child always has holes in his shoes, and a barber's son always needs a haircut; I must say that I think Moulton & Powell, if that's what they had in mind, could have drawn themselves a much better contract here, a much clearer one, I should say.

Mr. Cheadle: I am frank to say that I am puzzled, whether the contract bears the date of August 30, because it was dated [167] when the payments were to be paid, I do not know; the payments were made on vouchers issued in July, and another in September, but the warrants were actually paid in October, I believe about October 19.

We do not think there is any question, your Honor, but what under the decree of the Benton County Court it was appropriate for the District

directors to make this contract. It states that directors “until further notice or decree of this Court as hereinafter provided for” “shall continue to function as directors of said district and in particular shall do any and all things necessary to the defense by said district against the petitioner” in this condemnation case, and do everything else necessary to protect the interests of the District, directed them to do so as directors of the District, and the statute law shows clearly that they do have authority to make that contract.

Mr. Ramsey stated as a matter of law compensation just could not be based on a contingent fee contract by this municipal corporation. I submit that the Okanogan case, *State ex rel Hunt vs. Okanogan County*, cited in our list of authorities, 153 Wash. 399, shows otherwise. Mr. Ramsey read from the opinion of the appellate court—

The Court: I don't know whether I get your point there. Are you talking about Mr. Ramsey's trust fund theory here, that they are in effect bringing a trust fund into being here? [168]

Mr. Cheadle: Yes. I submit, your Honor, that Okanogan County and the commissioners of Okanogan County are fiduciary officers. Whatever funds they received they were holding in trust for the county; they were permitted to make a 50 per cent contract in that case.

The Court: Yes, I'm familiar with the Hunt case, but it seems to me there would be a difference where Okanogan County was a going concern, it was

a live and functioning municipality; Mr. Ramsey's point is here you have a defunct one, it's gone out of existence for all practical purposes, and its de facto directors are only trustees for the fund. I think if you can see such a thing as a county going out of business then you would have a comparable situation; but go ahead, I don't want to interrupt you too much.

Mr. Cheadle: Regarding Mr. Ramsey's references to the Court of Appeals opinion, I respectfully submit, and with due respect to Mr. Ramsey, that he gave a few selective readings. I'm rather hesitant to rebut likewise with a few selective readings, the selections being of course different than those read by Mr. Ramsey, but I do want to point out that the court did state on page 6 of its pamphlet opinion:

“Judge Driver assumed that the Schwellenbach formula meant that as to the assets of the District ‘which were not used exclusively for irrigation’ ”

and those are the only ones for which award was allowed, [169]

“ ‘that they did not enter into the value of the land as determined by the jury, that the owner was entitled to his pro-rata share as to the value of those properties not used for irrigation.’ ”

Those are the properties for which award was allowed. It is that part of the Schwellenbach formula

which resulted in award, and it was affirmed by the Court of Appeals. The Court of Appeals was quoted that the owner was entitled to his pro-rata share as to the value of those properties not used for irrigation, and on page 9, in a footnote, the court notes that the question as to distribution of assets is of course to be left to the Benton County Court where, as the court stated, all rights of all parties were preserved. On page 12 the court states that as regards the factual aspect, and they were referring to procedure, they accepted "the appraisal of Judge Schwellenbach." On Page 14 they concluded that the record does not sustain the attack on the validity of the Schwellenbach formula.

In other words, as respects the attack on the Schwellenbach formula, the government's appeal was denied, the District's cross appeal was denied, and the court was found in error solely with regard to the application of the \$170,500, and on page 14 running to page 15 the court quotes at length from Judge Schwellenbach's memorandum opinion, noting that in this particular regard he was speaking exclusively of the [170] non-irrigation assets, not of the so-called irrigation assets.

Again on the bottom of page 15 and on page 16 the further notation is made of the award for the non-irrigation assets. It is stated "In his summation at the close of the case Judge Driver made plain that his judgment would provide compensation to the District for only that portion of its facilities not devoted to irrigation uses" and further the court states:

“We are in accord with the conclusion of the lower court that utilization of the Schellenbach formula was eminently fair under the unprecedented circumstances of this case, and that applying it did not work a confiscation of private property or property rights of the District landowners. In this view of the case it logically follows that at the time of entry of judgment the Government had fully paid for and was the owner of all of the so-called irrigation assets of the District.”

The Court of Appeals definitely affirmed the ruling that compensation was due and had to be paid for the non-irrigation assets, and it quoted with approval that part of Judge Schwellenbach's opinion in which he stated the landowners should have it. We are not seeking to have this court make that ruling. That is part of the argument, of course, which we will present to the Benton County court.

As regards government counsel's statement of what the expert witnesses testified to, I do not question it, but I [171] wish to point out to the court that our witnesses were questioned merely to that question which is pertinent to our petition, is this a provision of reasonable contingent fee in this contract pursuant to which we seek payment. They did not go into the broad question of quantum meruit services as did the government's witnesses.

We do not question the authority of cases cited in government counsel's brief. I do wish to question their applicability, your Honor, to this case. Mr. Powell will make reference to some of them in his

argument. I regret, through probably government counsel's stenographer's error, the 223 Fed. 420 on the Central Trust seems to be a wrong volume of Federal. We did not read that case. The Harrison vs. Peria case, that was an action involving estates of deceased persons, the lower court determined a fee against the fund recovered, and there was an objection, and it was affirmed. The Colley vs. Walcott case, the quotation in the government's points and authorities is not a quotation from the opinion of the court itself; it may be from a headnote or a digest paragraph; at any rate, that case was an appeal from an allowance of an attorney fee which had been allowed against the fund, and the appellate court did affirm. One of the errors assigned, and that error assigned in connection with which the court did say something in substance like what is quoted here, error was assigned because there was no evidence [172] offered on which to base the order allowing the fee, and the court pointed out that the same court which allowed the fee had heard the case and was familiar with it, and so on. There was no point of the court fixing a fee with disregard to a contract. The issue was of the court fixing a fee where one had been allowed without apparently any introduction of evidence on the fee question.

There are very few cases, your Honor, I wish to add to those set forth in our points and authorities. I do wish to refer the court to Spellman vs. Bankers' Trust Co., 6 F. 2d 799, 800. It's in the Second Circuit, 1925. The court held the contract of retainer having been made in New York State, we,

the Federal court, hold that the rights of the parties should be determined under the contract law of New York. In *Shattuck vs. Pennsylvania Railroad Co.*, 48 F. 2d 346, that being a District Court decision in the Western District of New York, the *Spellman* case was cited and the court likewise there held that the contract having been made in New York State, in this Federal court proceeding the rights of the parties were to be determined by the New York contract law.

I emphasize that, your Honor, because we feel that the propriety of this contract, the authority of the District to enter into it, should be considered in view of the applicable law, statute law and case law, of the state of Washington. I add further, your Honor, two cases which we believe rebut the contention [173] of the government that the 1946 contract is not supported by any consideration; *Long vs. Pierce County*, 22 Wash. 330, at 344 and 348, also 61 Pac. 142, and *Stofforan vs. Depew*, 79 Wash. 170.

The Court: It would seem to me, Mr. Cheadle, I don't recall Mr. Ramsey having discussed that point, at least in his oral argument, but it would seem to me that it perhaps wouldn't be directly involved here, because if there is work that has been done not in contemplation of the parties when the first contract was executed, there would be consideration for the second one. If on the other hand nothing was done not in contemplation of the parties, then the question of consideration for the

second one would be moot, because you couldn't recover.

Mr. Cheadle: That is correct. There are also cases which hold no consideration is necessary in a contract which modifies another contract, but we submit the uncontradicted evidence shows there were proceedings not within the contemplation of the parties, that the contemplation of the parties was limited as to the services rendered, and that accordingly the second contract was fully supported by the consideration of those services which had not been contemplated initially, and we emphasize the fact that the evidence is not controverted which shows the evidence, which was what was in the contemplation of the parties. We submit that the October 30 contract read as a [174] whole permits the consideration of such evidence, both documentary and testimony.

I'm not going to repeat, your Honor, or go into the points and authorities which the Court has stated have been read. We do submit that the Hardman case and the Okanogan case in 153 Wash., the Albert vs. Munter in 136 Wash. clearly show that contingent fee contracts are appropriate, are appropriate when entered into by a municipal corporation. We submit also that the statute law and the decree of the court in Benton County authorized these de facto directors, who the Benton County court in its August 1 decree directed to proceed as directors of the irrigation district to do everything necessary in the defense of this condemnation case, and that they did proceed in accordance with the

statute law of this state regarding the powers and authority of irrigation district directors, which statutes are quoted in our points and authorities. We submit that the amount of the fee as our witnesses stated is more than reasonable as provided in that contingent fee contract. The contract has been performed, and we submit that we are entitled to payment in accordance with it. The District, the other party to the contract, is agreeable as its formal resolution here in evidence shows. We submit that the order prayed for in our petition should be granted.

The Court: The Court will take a ten minute recess. [175]

(Short recess.)

Mr. Powell: Your Honor please, I think I should ask whether your Honor wants to hear from me, because I testified and I don't know whether I'm permitted to argue.

The Court: Oh, yes, if it's necessary you have the court's permission to argue as fully as you care to do so.

Mr. Powell: Thank you. Well, I don't intend to touch on many of the matters that I've gone into before. I assume that the court is considering the entire record in the entire case in considering this matter, and the record in this case would all bear out or corroborate some of the testimony given as to the work performed. Also in connection with the one recital, much in issue here, signed in October, 1943, there is reference to employing other attorneys. I think your Honor will find that early in

1943 Mr. Cunningham joined with us in a brief concerning the filing of an early motion, and I think you'll find we paid him his attorney fee.

The Court: I've had a little difficulty with the time element here. I was first under the impression this October contract was made before the questions in which the District was interested had been decided in the test cases, but I think I was mistaken in that; as I understand it, the test cases were decided and your work was concluded before October 30, 1943.

Mr. Powell: That's correct; however, I can't account for the contract, because the contract was supposed to follow our [176] conference in June, and I think the dating of the contract was a matter of dating it when it was signed rather than when it should have been signed.

The Court: The thing that puzzles me is why there was a written contract for services already rendered and for which you had been paid.

Mr. Powell: I can't explain it, I didn't sign the contract, but at the same time that is the contract referred to in the June minutes when I was there, and the money involved is the money referred to in the three vouchers in evidence here. Now, counsel mentions the contract of October, 1943, and says that the contract of 1946 could not be entered into, and the Court in discussing the matter with Mr. Cheadle mentioned the fact this is not a going concern, and therefore they would be de facto directors and there might be a question whether they had the authority to make the contract. It seems to me if

that is the case the same thing would be true as to the 1943 contract, because their functions were curtailed in the taking over of the property by the government, because that would be the time at which they started to take the irrigation district properties away.

Now, counsel makes mention of the fact this is an improvident contract and he refers to the fact the irrigation district directors are going to give to the directors a substantial sum of money, which is \$79,000. I think probably at first blush [177] that may sound accurate, but at that time there wasn't any specific amount involved, there wasn't any definite assurance what the jury would do or what the witnesses would find, so when that contract was made it couldn't have been an improvident contract, because nobody knew what kind of a result would be obtained in the trial court before the jury or in the Circuit Court of Appeals. It seems to me on the basis of counsel's own argument it was a provident contract, because it limited the attorneys to a percentage of any recovery, and if they didn't recover anything they wouldn't get any fee. It seems to me it was in the nature of a very provident contract as far as the directors were concerned.

I think Mr. Cheadle mentioned it in his discussion, but we have felt this was entirely a matter of a contingent fee because of the fact there wasn't any fund at the time the services were performed or rendered upon which we could base a claim for services, and therefore by the very nature it would have to be a contingent arrangement. If the Court

is entertaining the view that the matter is to be decided upon the value of the services rendered then we feel we should like to have opportunity to present some additional testimony, because we did release some of our witnesses in that connection before that question had arisen.

I don't care to address the court any further; this is a matter very personal to Mr. Cheadle and me, and it's a little [178] difficult and embarrassing for me to present it because of the fact it involves matters pending almost seven years. I appreciate your patience and courtesy.

Mr. Ramsey: May it please the Court, there are only one or two matters I want to touch on very very briefly in rebuttal. Mr. Cheadle has submitted to the court the proposition that in the June 10 minutes of the meeting, that the work for which counsel had been employed and paid under this first contract was actually the preparation of a brief which was referred to at that time, and that the understanding was general that the payment made was to be only to the time of trial, for work done to the time of trial. Now, I want to point out to the Court that this contract is dated October 30, and I assume was executed on the date that appears on the face of it. Now, it recites certain things, and they're specific; there isn't any fooling around about it. If 'way back there in June all the parties understood that this payment of \$2,000 was to compensate only for the preparation of this brief, which had already been prepared and submitted, or for work to be done up to the time that the case went

to trial, then why didn't they say so in the contract? Why did they draw the contract that they did draw, and why did Moulton & Powell sign it? I can't believe that there was any such understanding between these parties. I certainly can't believe that a law firm as outstanding [179] as Moulton & Powell would bind themselves on a contract such as they did bind themselves under, the contract here, when their understanding was what some of the witnesses very haltingly suggested might have been their understanding in their testimony before this court.

Now, all of these matters, these minutes, these so-called "Well, we understood that this was to be for that or this or the other thing" occurred before the execution of this contract. I don't see any testimony before this court, I don't see any chance that the court can reach any logical conclusion other than that the parties on October 30, 1943, meant exactly what they said under that contract. I'm not going to touch upon the rules of law regarding the varying of the terms of a contract by parol evidence or anything of that sort. I'm perfectly willing for the court to take a broad view of the whole situation. All I ask is that he apply the rule of ordinary common sense to the situation as it exists, bearing in mind that the parties to that contract, other than the de facto board of directors, was a firm of attorneys, and an excellent firm of attorneys. They prepared the contract themselves and they signed the contract themselves, and they must have expected to be bound by the terms of the contract itself.

Now, if I have given the impression to the court as I apparently have to counsel that it's my position that the de facto board of directors of this District were without authority [180] to act for the District either by way of making a contract or anything of the sort, I want to disabuse the court of that idea. I am not arguing that point; I am not making any such claim. Of course the de facto board of directors had authority to act on behalf of the District. They are under rules which apply in trust law as to how they shall act. They're acting for the benefit of a trust fund, and subject to the law that applies to that, but under the statutes of this state it didn't take any decree of Judge Paul in the Superior Court of this state for Benton County to constitute them de facto directors of that District or to authorize them to act on behalf of that District. They had that statutory authority. However, they did go into the Superior Court. They asked that Judge Paul decree that they were de facto directors of that District, and he did so; I don't know that he hurt their position any by that decree; he certainly didn't help it. That was their position before they ever went into that court, and it was their position when they came out.

They asked that he supervise the administration of the trust, and that's their own language "of the trust" and he decreed that the Court was retaining jurisdiction and supervision of the administration of that trust. He did that on the petition of the de facto directors of the Priest Rapids Irrigation District. They went back into that court in 1947,

set up the necessity of obtaining money for the purpose of [181] carrying forward this case, trying it, appealing it, asked for authority to issue these certificates of indebtedness, but they didn't then or at any other time say anything to that court about attorney fees, and they didn't then or at any other time submit this contract, 1946 contract to the court to be approved. They went in just before they went to trial with this case and applied to that court for authority to issue certificates of indebtedness in order to secure funds with which to carry on the case, but there never was any submission of the matter of attorney fees or of any contract, or the court wasn't asked to determine what was reasonable attorney fees; the court wasn't asked to pass upon the reasonableness of this contract; in fact, the matter wasn't mentioned, although theoretically they were acting upon the theory that the court was supervising the administration of the affairs of the Priest Rapids Irrigation District. I submit to the court that these petitioners are entitled to a reasonable attorney fee, that these contracts should be completely disregarded, and this court should fix what constitutes reasonable compensation to these petitioners for their services on behalf of the District in this case.

(Whereupon, detailed list of expenses was admitted in evidence as petitioner's Exhibit No. 18.)

(Discussion between court and counsel of list of expenses.) [182]

The Court: Well, gentlemen, I'm not going to make any detailed statement here. I might say that for the reasons Mr. Ramsey has advanced here I have concluded that I shouldn't be bound by this contingent fee contract made in 1946. On the other hand I do not believe that these attorneys are bound by the first contract made October 30, 1943. It's inconceivable to me that attorneys—while I can't understand all of the details in connection with the matter, and some of them are very puzzling, I can't conceive of attorneys of the experience of Moulton & Powell and their knowledge of the matters involved here, to have undertaken to prosecute this litigation through for the sum of \$2,000, and the allowance of that amount would be grossly inadequate and would result in hardship, certainly, to these attorneys who have done the work in this litigation.

It seems to me that the conclusion is inescapable that at least at the time of the making of the 1946 contract the de facto directors were acting as trustees for the ultimate beneficiaries of the award paid for the District's property. It was apparent to everybody at that time that for all practical purposes the District was out of business, that it would not ever again function as an irrigation district, and the only duty that the directors had was to protect the fund and bring in such funds as they could and protect it for the benefit of the beneficiaries. Those beneficiaries we do not yet, I think know who they will be. It may very well be that the government will [183] be paid back under the *In Re Horse*

Heaven case, the doctrine in that case, that the money will be returned to the government. It may be that it will be paid to the land owners in the District at the time the government filed its petition here, or part of them, at any rate, or some of them, but whoever those beneficiaries may ultimately turn out to be, they were not parties to the contract that was made in 1946.

The District had no money with which to pay attorneys except from the funds that might be recovered, and it seems to me that we do, in practical effect here, have a situation where trustees by litigation bring in funds to be distributed to others than the party litigants, and while I think that this court should determine the compensation to be paid to the petitioners irrespective of the 1946 contract, and without being bound by it, nevertheless I think that I should properly take into consideration that the services were rendered on a contingent basis, and necessarily so, because if the litigation had been unsuccessful Moulton & Powell or these attorneys would not have recovered anything for their services, because there was no funds other than what they would bring in by the litigation to pay them, and in that connection I think perhaps some of the witnesses for the government here, the attorneys who appeared, I doubt if they took fully into consideration the contingencies involved in the matter of prosecuting this litigation. It was not only the usual contingency as to whether any [184] substantial amount would be recovered at all in the trial court, but also here there was a grave ques-

tion as to whether even if the attorneys made a substantial recovery they would be able to collect their fees from the fund.

That contingency is still before us here in a very definite way so that there was the contingency, as I say, of the amount of the recovery, and then whether even if they did make a recovery they could collect their fees from the fund. I need hardly say that the litigation is unusually difficult, involved questions that were not only novel, but perhaps unique, and that the case was very capably conducted and successfully prosecuted both in the trial court and the appellate court.

On the other hand, I am keenly aware of my responsibility here in that I do represent the beneficiaries of the trust, and in that I am dealing with trust funds, and bearing those various things into consideration it seems to me that \$50,000 is what I would consider appropriate compensation on a contingent basis for the work that has been done here, under the circumstances as they appear from the evidence and from the record. I might say that I regret that perhaps counsel didn't have an opportunity to present their witnesses here on the basis on which the government presented its evidence as to the reasonableness of the services, but I am assuming that your witnesses for the purpose of my decision would testify that the amount of your contract is a fair and reasonable fee on a [185] contingent basis, which is the basis that I am following, so you are not prejudiced by not having them testify.

If I had before me a contingent contract of this kind between a live and functioning municipal corporation and attorneys on some claim that the District had, I would not hesitate to say that this is a fair and reasonable contract. I think it is, but under the circumstances of this case, where the District had gone out of business, where the funds are being brought in as trust funds for the benefit of beneficiaries and the beneficiaries may very well be the government in this case, I think that the court should be somewhat conservative, perhaps, if I may put it that way, in the matter of the allowance of fees, and I think that even in these times of inflation \$50,000 is a good fee in a lawsuit.

Mr. Cheadle: May I make an inquiry of the Court? I assume the \$50,000 is the total amount of the fee in the condemnation case which your Honor thinks should be allowed?

The Court: Yes, that's my position.

Mr. Cheadle: With all due respect, in view of the legal determination made by your Honor and therefore the approach made to the fee question, I do respectfully submit that we have not had opportunity to interview witnesses or to present testimony as to what the reasonable value of these services would be upon the basis mentioned by your Honor. Our witnesses would testify, I am confident, in view of what they told us, and I [186] believe to an extent as shown by their testimony, that a fee of more than \$79,000 would be reasonable for the services rendered here considering the contingent situa-

tion. We have not had opportunity to present that testimony.

The Court: Well, I'm sorry that there was a misunderstanding, Mr. Cheadle, but as I recall I very plainly stated that I suggested that it be stipulated that your people would testify that this fee provided for in the contract was a reasonable fee, and then that they could be permitted to go on their way, but I said if Mr. Ramsey puts on testimony on some other basis, you will be permitted to bring them back in rebuttal if you care to do so, and you did put on Mr. Gavin, and I assumed you didn't care to put on the others. It was obvious from Mr. Ramsey's brief that he was contending very vigorously that the court should not be bound by your contingent fee contract, and should set a fee on the basis of what was reasonable.

Mr. Cheadle: That is correct, your Honor. We didn't know what the government's position was until yesterday, your Honor. I should say perhaps the day before. Mr. Shefelman flew in here, or rather came in by train, early in the morning. No response was filed to our petition. We petitioned for allowance of our fee per contract. I am not, your Honor, seeking to reargue at all the ruling that your Honor has made as regards the basis for approaching this fee question, but I do respectfully submit—— [187]

The Court: If you wish to wait until I come down to Yakima here again, this fund isn't bearing interest, there's no detriment to the government—— do you have any objection, Mr. Ramsey?

Mr. Ramsey: None whatever.

The Court: If you wish to reopen it again when I come down here, I'm not going to stay over for it, and I'm not going to make a special trip, but the next time I'm here I'll permit you to put on evidence of experts as to what would be a fair and reasonable fee in the absence of contract. I want it distinctly understood, however, that I'm not obliged to go up from \$50,000, that I reserve the right to change my mind and go down. It will be entirely up in the air, if you want to reopen it; I may give you \$79,000, I may give you \$25,000 or \$15,000, whatever I think at that time.

Mr. Cheadle: May I have opportunity to consult with my associate and advise the court and counsel?

Mr. Ramsey: I assume the government will be permitted to go back into it too?

The Court: Oh, yes, of course.

Mr. Ramsey: I was shooting in the dark; I didn't know which theory your Honor wanted to pursue. Certainly I tried to make myself clear in my points and authorities; it's true probably, these gentlemen didn't get this until yesterday, although I mailed it down——[188]

Mr. Cheadle: Day before yesterday.

Mr. Ramsey: It was mailed out the same day I received the points and authorities of petitioners.

The Court: Well, I certainly have no desire to preclude either side from presenting all the evidence they think that they should present here, because it is an important matter, and I'll give you

that opportunity, but it will have to be the next time I'll be down here. I think February 23 is the next day here, and we'll set it and give you notice. However, if you decide you'd prefer to let the matter stand, you can let me know.

Mr. Cheadle: We will do that, your Honor.

Mr. Powell: May I ask your Honor if the statement your Honor made of \$50,000 would be with or without the \$2,000 credit? That wasn't mentioned by your Honor.

The Court: Well, as I said at the outset, I didn't propose to go into all the points or arguments here in detail. The way I regard this matter, and I think that that should be considered when your additional witnesses are brought on here, as I view it this is not purely a contingent situation. I think that Moulton & Powell started out, I don't fully credit this matter that they were only to work upon the test cases, I think Moulton & Powell has received \$2,000 already in cash, and that the balance of their compensation was on a contingent basis, and so I'm awarding this as the additional [189] compensation not contemplated by the parties in the original contract, and that this is additional compensation in addition to what has been received.

Mr. Powell: Thank you.

Mr. Ramsey: Just a moment, your Honor please, have you ruled as yet on the petition for payment of expenses?

The Court: No, I haven't. I don't think you understood me, Mr. Ramsey. I said in view of your attitude I thought I should give you an opportunity

to present your objections; I meant in writing, however you have proceeded to state them, and I wish an opportunity to look over this account which I have just seen today, and I'll announce my decision on that sometime later. The court will adjourn until February 23 at 10 a.m.

Monday, February 27, 1950

The Court: This matter comes up on the petition of the attorneys for compensation in the matter of the United States of America against Clements P. Alberts and others. I believe that this was for the purpose of supplementing the record by the offer of additional proof as to the reasonable value of the services of the attorneys under the theory that the court adopted.

Mr. Powell: Correct, your Honor.

The Court: I think your experts [190] testified on a basis somewhat different than I adopted, as I recall, and you asked the privilege of completing the record by introducing evidence as to the reasonable value of the services on my theory.

Mr. Powell: Correct, your Honor. I might state to your Honor, and this will shorten the matter materially, we have discussed with counsel for the United States the necessity of presenting testimony, and he and we have agreed upon what that testimony might be, and so if I may I would like to read into the record a stipulation that Mr. Ramsey, Mr. Cheadle and I have made. It's a very short stipulation.

The Court: Yes, you may do that.

Mr. Powell: The attorneys, Mr. Cheadle and myself representing the petitioning attorneys and the Priest Rapids Irrigation District, and Mr. Ramsey representing the petitioner United States of America, have stipulated that if I were called as a witness and asked the questions concerning the subject, I would testify that I had worked between a thousand and fifteen hours on the Priest Rapids Irrigation District case——

The Court: A thousand and fifteen hundred.

Mr. Powell: Between a thousand and fifteen hundred hours.

The Court: I think you mis-spoke; I think you said fifteen; you meant fifteen hundred.

Mr. Powell: Thank you;—on the Priest Rapids Irrigation District condemnation case in the years 1944 to 1949 inclusive, and that if he were called to testify Mr. J. K. Cheadle would [191] testify that he had worked on the same case in excess of one thousand hours from October, 1945, through the year 1949; and further it is stipulated that if the witnesses were called V. O. Nichoson and John Gavin each would testify that without regard to any contract, but giving consideration to the necessarily contingent character of compensation for the services, the reasonable value of the services rendered in this condemnation case by petitioning attorneys is approximately \$80,000; and that the witness Harold Shefelman if he were called to testify would testify that without regard to any contract, but giving consideration to the necessarily contingent character of compensation for the services, the rea-

sonable value of the services rendered in this condemnation action by the petitioning attorneys is in excess of \$80,000. It is further stipulated that the record of the hearing in this Court on the petition for the payment of attorneys' fees shall be deemed to contain the above testimony the same as though the witnesses named were present and did so testify.

Mr. Ramsey: The government so stipulates.

The Court: Very well.

Mr. Powell: That's all we have, your Honor.

The Court: I see. All right. Would you care to be heard then in further argument? I'll hear you.

Mr. Powell: I think about all that I need to mention to your Honor and would like to mention in that regard is that in [192] a discussion, and this I haven't advised counsel about except very generally, in a discussion with the attorneys in Washington of the Department of Justice it was brought to my attention that they felt that there was no jurisdiction in this court to entertain a petition of this kind. I think that your Honor's attention might be called to the fact that on the government's petition the original judgment was amended to provide that the money would not be paid into the Superior Court in the liquidation case, but would actually be held here in this court subject to your Honor's order, and for that reason we feel that your Honor has specifically retained jurisdiction of this matter so that this order could be made.

The Court: It runs in my mind too that the Court of Appeals approved that method of pro-

cedure over the very vigorous protests of Chief Judge Denman in his dissent; the majority of the court held it was proper for me to retain control.

Mr. Powell: That's my understanding too, your Honor, and that particular part of the judgment was not appealed from by the government and was therefore affirmed in the affirmance of the judgment.

The Court: It seems to me that this proceeding might well be regarded as a petition on your part for me to release a sufficient amount of the funds to pay you.

Mr. Powell: That's [193] correct.

The Court: You could very well come in and say "Well, our clients are ready to pay us seventy-three—or whatever the amount was—thousand dollars"—

Mr. Powell: \$78,000.

The Court: —and the government protests because they say that's too high, and I am obliged, having control of the fund, to determine that point.

Mr. Powell: That's correct, your Honor, that's the position we take in regard to this particular hearing, and your Honor has made a determination, and we are supplementing the record in that regard, and have prepared an order in accordance with your previous ruling in that connection.

(Short Recess.)

The Court: The Court will resume session. I find myself in a position that is a little difficult to express, perhaps. I had thought that the government possibly would pay this attorney fee which I

had allowed. It's a litigant's absolute right, of course, to appeal, and I have no disposition to either prevent or in any way hinder the taking of an appeal from any action which I might take in any case, this or any other. It does seem to me, however, that if these attorneys are to have to go to the Court of Appeals again to establish their right to an attorney fee, whether it's on the basis that this court has no jurisdiction or the fee that I set is too high, or for whatever cause, I think I can at least, while [194] they shouldn't have any additional compensation for appealing, I think it does indicate that their fee was on even more of a contingency basis than I had thought, if it means another trip to the Court of Appeals, so that I'm not going to put it on that basis, I'm going to put it on the basis that the showing that these attorneys, who are reputable and experienced attorneys, Mr. Gavin, Mr. Nichoson and Mr. Shefelman, would testify that the fee even on the basis which the court indicated, that \$80,000 would be a reasonable fee, I'm going to add 10 per cent and make the fee \$55,000.

This may be a little irregular, but I'll do this, if there's no objection to it, I'll defer entry of the order for, say 10 days, and if the \$50,000 is paid within that time I'll not add the 10 per cent, but if it's not paid within ten days then an order may be taken fixing the fee at \$55,000, and I think I should make it clear again that while I'm speaking aloud and taking into consideration these other fac-

tors, that the basis of my fixing that amount, \$55,000, is the testimony of the three experts, the lawyers, and I would fix it on that basis aside from the other consideration. If that's all, then, gentlemen, the court will adjourn until tomorrow morning. Mr. LaFramboise just mentioned here that I probably unconsciously spoke as if this were an ordinary situation where an attorney fee were to be paid; it isn't really to be paid, it's to be withdrawn; what I meant is that if the parties agree to [195] have the money withdrawn in accordance with my previous ruling within ten days, then the \$50,000 will stand, otherwise an order may be taken fixing the fee at \$55,000.

Mr. Powell: May I ask whether we should withhold the presentation of any order for ten days?

The Court: Yes, I think so. I'll put it this way: If the government agrees to the amount of this fee and does take the position that the court has jurisdiction to allow it, then you can present an agreed order for \$50,000. If you're unable to do that, then present an order for \$55,000. Is that clear, then?

Mr. Powell: Yes, thank you.

The Court: The Court will adjourn until tomorrow morning at 10 o'clock.

Friday, March 10, 1950

The Court: Did you have something to present, gentlemen?

Mr. Powell: Yes, your Honor.

The Court: Will it take much time?

Mr. Powell: No, your Honor, just two or three minutes.

The Court: All right, you may proceed then.

Mr. Powell: I have for presentation, if your Honor please, the order for payment of attorney fees in cause number 128-99.

The Court: The ten days have expired now that I indicated [196] I would hold the matter in abeyance?

Mr. Powell: Yes, your Honor. The order makes provision for the withdrawal of funds on the petition in behalf of the irrigation district supported by the resolution, and this last paragraph, the one which starts at the bottom of page 1, provides that withdrawal shall be made for the benefit of the Priest Rapids Irrigation District and paid to the attorneys.

The Court: Do you have any comment to make, Mr. Ramsey? I see you've approved it as to form only.

Mr. Ramsey: Yes, your Honor. Of course the government would like the record to show that the government objects to the allowance of attorney's fees in this case in the sum of \$55,000 or any other sum.

The Court: I assume your approval is merely to the form of the order, not to its substance.

Mr. Ramsey: That's right. At this time the government files written notice of appeal in the case, and moves for stay in the proceeding pending the completion of the appeal, and asks for an order staying the proceeding.

The Court: The Court has signed the order allowing attorney fees of \$55,000 to Mr. Cheadle and Mr. Powell, or Moulton & Powell, and have you any comment to make on the order for stay? I assume they're entitled to a stay.

Mr. Powell: I understand so, your Honor.

The Court: Without bond, since its [197] the United States.

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on January 5 and 6, February 27 and March 10, 1950, at Yakima, Washington.

That the above and foregoing, consisting of type-written pages numbered 1 to 165 including this page, contains a full, true and correct transcript of the proceedings had therein.

Dated this 28th day of March, 1950.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the Original

Application for Extension of Time for Filing Record on Appeal,

Order Extending Time for Filing Record on Appeal,

Petition for Payment of Attorneys' Fees,
Exhibits,

Transcript of Proceedings,

Order of March 10, 1950, for Payment of Attorneys' Fees,

Notice of Appeal,

Motion for Stay of Proceedings,

Order for Stay of Proceedings,

Notice of Cross-Appeal,

Bond on Cross-Appeal,

Points and Authorities filed by petitioning defendant,

Designation of Record,

Points on Appeal,

Points on Cross-Appeal,

Modified Judgment,

Petition for Payment of Certificates of Indebtedness,

Order Directing Payment of Certificates of Indebtedness,

on file in the above-entitled cause, and that the same constitutes the record for hearing of the Appeal from the Order of the Court for payment of Attorneys' Fees entered and filed in said Court on the 10th day of March, 1950, in the United States Court of Appeals for the Ninth Circuit as called for by the Stipulation for Designation of Record on Appeal of Appellant and Appellee.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District Court at Yakima in said District, this 1st day of June, 1950.

A. A. LAFRAMBOISE,
Clerk.

[Seal] By /s/ THOMAS GRANGER,
Deputy.

[Endorsed]: No. 12563. United States Court of Appeals for the Ninth Circuit. United States of America vs. Moulton & Powell and J. K. Cheadle, Appellees, and Moulton & Powell and J. K. Cheadle, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed June 2, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals
for the Ninth Circuit

No. 12563

UNITED STATES OF AMERICA,

Appellant,

vs.

PRIEST RAPIDS IRRIGATION DISTRICT,
a Public Corporation,

Appellee;

PRIEST RAPIDS IRRIGATION DISTRICT,
a Public Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION

Come Now the parties to this appeal and move the United States Court of Appeals, for the Ninth Circuit, for the entry of an order authorizing and directing that the transcript of record on appeal, consisting of three volumes, in Cause No. 11,704, entitled as above, and now on file in said Court of Appeals, may be used and referred to by the parties to this appeal without the necessity of any

further printing of said record, the same as though it were included as a record on this appeal.

/s/ BERNARD H. RAMSEY,
Special Assistant to the Attorney General, Attorney for United States of America.

MOULTON, POWELL & GESS,

/s/ J. K. CHEADLE,
Attorneys for Priest Rapids Irrigation District, a Public Corporation.

[Endorsed]: Filed June 12, 1950.

[Title of District Court and Cause.]

STIPULATION TO INCLUDE PREVIOUSLY
PRINTED RECORD

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the printed transcript of record on appeal in three volumes in Cause No. 11,704, captioned as above and now on file in the United States Court of Appeals for the Ninth Circuit, may be considered and used in this proceeding without the necessity of reprinting the same, the same as though it were filed in this proceeding, this being an appeal from the same cause involving in part the same issues previously presented to the Court of Appeals for the Ninth Circuit.

It is further stipulated that an order may be entered by the Court of Appeals for the Ninth Cir-

cuit approving the stipulation and ordering and directing that the three volumes of the transcript of record on appeal in Cause No. 11,704 in said Court, may be used and referred to by the parties to this appeal without the necessity of printing or designating any part or portion thereof.

/s/ BERNARD H. RAMSEY,
Special Assistant to the Attorney General, Attorney for United States of America.

MOULTON, POWELL & GESS,
/s/ J. K. CHEADLE,
Attorneys for Priest Rapids Irrigation District, a Public Corporation.

[Title of District Court and Cause.]

ORDER AUTHORIZING CONSIDERATION OF PREVIOUS RECORD ON APPEAL

This Matter having come on regularly in its order to be heard before the above-entitled Court upon the motion of the parties to this appeal, supported by their stipulation, and the Court of Appeals of the Ninth Circuit having considered the designation of record on appeal in this cause, the stipulation, motion and the transcript of record on appeal in Cause No. 11,704 in this Court, and being duly advised,

Now, Therefore, It Is Hereby Ordered that the transcript of record on appeal consisting of three

volumes of printed record in Cause No. 11,704, in this Court, entitled “United States of America, Appellant, vs. Priest Rapids Irrigation District, a public corporation, Appellee; Priest Rapids Irrigation District, a public corporation, Appellant, vs. United States of America, Appellee,” shall be considered as a portion of the transcript of record on appeal in this cause and on this appeal the same as though it were specifically designated on this appeal, and

It Is Further Ordered that the parties to this appeal may refer to the transcript of record on appeal in Cause No. 11,704, consisting of the three printed volumes thereof, by referring to the same throughout the record and briefs as record in Cause No. 11,704, reference being as follows: R. 11,704, page”

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ CLIFTON MATHEWS,

/s/ WILLIAM L. HEALY,
United States Circuit Judge.

[Endorsed]: Filed June 12, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD

The United States of America, appellant in the above-entitled cause, designates the following portions of the record as filed and certified to be printed in their entirety:

1. Petition for payment of attorney fees with attached exhibit.
2. All exhibits introduced and received in evidence.
3. Transcript of all proceedings on January 5 and January 6, 1950; February 27, 1950, and March 10, 1950, which will include argument taken by the reporter.
4. Order of March 10, 1950, also notice of appeal, motion and order for stay of proceedings, notice of cross-appeal and bond on cross-appeal.
5. Points and authorities filed by petitioner and defendant on original hearing on petition for payment of attorney fees.
6. Designation of record.
7. Points on appeal and cross-appeal.
8. Modified judgment of November 21, 1949, to conform to Circuit Court of Appeals opinion.
9. Petition for payment of certificates of indebtedness.

10. Order directing payment of certificates of indebtedness.

Dated this 19th day of June, 1950.

/s/ A. DEVITT VANECH,
Assistant Attorney General.

/s/ JOHN F. COTTER,
Attorney, Department of
Justice, Washington, D. C.

/s/ BERNARD H. RAMSEY,
Special Assistant to the
Attorney General.

[Endorsed]: Filed June 21, 1950.

[Title of District Court and Cause.]

CROSS-APPELLANTS' DESIGNATION OF RECORD

Moulton & Powell and J. K. Cheadle, cross-appellants in the above-entitled case, designate the following portions of the record, as filed and certified, to be printed in their entirety:

1. Petition for payment of attorney fees with attached exhibit.
2. All exhibits introduced and received in evidence.
3. Transcript of all proceedings on January 5 and January 6, 1950; February 27, 1950, and March

10, 1950, which will include argument taken by the reporter.

4. Order of March 10, 1950, also notice of appeal, motion and order for stay of proceedings, notice of cross-appeal and bond on cross-appeal.

5. Points and authorities filed by petitioner and defendant on original hearing on petition for payment of attorney fees.

6. Designation of record.

7. Points on appeal and cross-appeal.

8. Modified judgment of November 21, 1949, to conform to Circuit Court of Appeals opinion.

9. Petition for payment of certificates of indebtedness.

10. Order directing payment of certificates of indebtedness.

Dated this 23rd day of June, 1950.

/s/ J. K. CHEADLE,

MOULTON & POWELL and
J. K. CHEADLE.

[Endorsed]: Filed June 26, 1950.

No. 12563

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

MOULTON & POWELL AND J. K. CHEADLE, APPELLEES

MOULTON & POWELL AND J. K. CHEADLE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES, APPELLANT

A. DEVITT VANECH,
Assistant Attorney General.

BERNARD H. RAMSEY,
*Special Assistant to the Attorney General,
Yakima, Washington.*

JOHN F. COTTER,
*Attorney, Department of Justice,
Washington, D. C.*

FILED

OCT 1 1930

PAUL W. GIBNEY

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(1)

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12563

UNITED STATES OF AMERICA, APPELLANT

v.

MOULTON & POWELL AND J. K. CHEADLE, APPELLEES

MOULTON & POWELL AND J. K. CHEADLE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON*

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The United States invoked the jurisdiction of the district court under the Act of August 28, 1890, 26 Stat. 316, as amended, 50 U. S. C., sec. 171, for the purpose of condemning the property of the Priest Rapids Irrigation District. On the day the district court entered final judgment in that proceeding (R. 9-19) appellees filed a "Petition for Payment of At-

torneys' Fee'' (R. 2-8). For the reasons stated in the Argument (p. 15-16 *infra*), it is believed the district court had no jurisdiction to entertain the petition. The district court's order for the payment of fees was entered March 10, 1950 (R. 32-33). Notice of appeal was filed March 10, 1950 (R. 34). The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1291.

QUESTIONS PRESENTED

1. Whether the money paid into court to satisfy a judgment in condemnation, which will either be returned to the Government or paid to those who claim to be former owners of the property condemned pursuant to a future determination, may be used to compensate the lawyers who represented the former owners in the condemnation proceeding.

2. Whether at the conclusion of a proceeding brought by the United States to condemn property the district court has jurisdiction to fix and order payment of attorneys' fees.

STATEMENT

This is an appeal (R. 3) from an order which directs "that the sum of \$55,000 shall be * * * withdrawn from the deposit of \$422,252.80 for the benefit of the Priest Rapids Irrigation District, for the payment of attorney fees for the prosecution of this action in behalf of said district" and that the clerk of the court "issue and deliver check in said amount of \$55,000 to Moulton & Powell and J. K. Cheadle" (R. 32-33).

The services for which they would be paid by the order appealed from were performed in the proceeding brought by the United States to condemn the properties to which the Priest Rapids Irrigation District had legal title. The judgment entered in that proceeding was reviewed by this Court on appeal and cross-appeal (No. 11704) and resulted in an opinion reported as *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524. The facts disclosed by that record which are pertinent upon this appeal are as follows:

The condemnation proceeding was commenced on May 12, 1944, after the United States had acquired all the potentially irrigable land in the District. On that day the United States filed an amended petition in condemnation (R. 11,704, pages 106–118) and a declaration of taking (R. 11,704, pages 119–130) and deposited \$170,500 as estimated just compensation. The petition alleged (R. 11,704, pages 117–118):

That the real property * * * described
 * * * constitute[s] all of the operating
 properties and facilities owned * * * by
 the Priest Rapids Irrigation District * * *.
 That petitioner, United States of America, by
 reason of its ownership of all the real property
 lying within the boundaries of said * * *
 District is * * * the equitable owner of
 the real property * * * described * * *,
 subject only to the lien of the bonded indebt-
 edness of said * * * District, and said
 * * * District * * * now holds legal
 title thereto in trust for the use and benefit of
 [the] United States of America. That the sum
 of \$170,500.00 deposited in the registry of this

court with the filing of declaration of taking
 * * * represents a sum which * * * is
 sufficient to pay and discharge all bonded in-
 debtedness of said * * * District.

On February 12, 1945, the District answered by Messrs. Moulton & Powell (R. 11,704, pages 161–167). It asserted that on February 23, 1943,¹ the properties condemned had a value of \$1,060,685, that the property owners in the District on that date were entitled to receive this amount, and asked for an order that the compensation when determined should be paid to it “as trustee for the use and benefit of all property owners in the district as of February 23, 1943.”

After the Government’s demurrer to this answer was sustained (R. 11,704, pages 181–182) the District on September 21, 1945, filed another on which issue was joined (R. 11,704, pages 182–191). This answer was also prepared by Moulton & Powell. Therein, after alleging it had title to property “not used exclusively in the delivery of irrigation water” of the value of \$847,815 and of property used in the operation of its irrigation system worth \$182,870, the District reiterated the claim for the former owners in the following terms (R. 11,704, pages 187–188):

IX

That this defendant prior to February 23, 1943, held the naked legal title to all the district

¹ On February 23, 1943, an order of immediate possession was entered (R. 11,704, pages 12–16) and the answer alleged (*idem*, page 165) that possession taken under that order compelled the District to cease operation.

property as trustee for the landowners entitled to receive water from the district and * * * now alleges that the owners of land within the district were the equitable owners of all the district property when the district was compelled to cease functioning as such, and are now entitled to receive and to have distributed to them all compensation which shall be awarded as just compensation for the taking of the district assets.

X

That this defendant is duly organized and existing irrigation district under the laws of the State of Washington, and its affairs are administered by B. Salvini and J. H. Evett as duly elected and qualified directors, and R. S. Reierson as its duly appointed and qualified secretary. * * * That the values of the assets above described should be determined by a trial before a jury and just compensation for the taking of the same thereby determined and that payment thereof should be made to Priest Rapids Irrigation District * * *. That when said payment is made the defendant may then pay the assets to the persons entitled thereto in liquidation proceedings instituted in the Superior Court of the State of Washington. That this defendant alleges that the persons entitled to said assets are the legal owners of the real property within the district as of February 23, 1943.

XI

That in the alternative and only in the event this court should deny the right of the Priest Rapids Irrigation District to collect the just

compensation for the property above described then the Court should appoint B. Salvini, J. H. Evett and R. S. Reiersen as trustees to liquidate the assets of the district, to have the just compensation determined for the taking of the assets of the district and to collect the same and pay and distribute the assets to the persons who were landowners on February 23, 1943, on the basis of the ratio of the acreage held by each landowner to the total acreage in private ownership on said last named date.²

Thus, the issue between the parties was plain. On the one hand the Government contended that, by reason of its ownership of all the lands in the District, it was equitable owner of the properties condemned and, having paid the District's debts, was entitled to the legal title. On the other hand, the District asserted that those who formerly owned the lands were entitled to a further sum for the properties condemned.

After the foregoing had occurred, and on August 30, 1946, the District, represented by B. Salvini and

² Thereafter, on March 23, 1946, C. I. Wright and Mamie Wright, former owners of 10 acres in the District, through Messrs. Moulton & Powell and J. K. Cheadle, moved for leave to file a complaint in intervention asserting that the former landowners were entitled to be paid the value of the condemned properties (R. 11,704, pages 205-215). On June 26, 1946, the motion was denied (R. 11,704, page 290). Before the ruling was made, the following colloquy occurred (R. 11,704, pages 289-290):

"The COURT. * * * in my view of the situation it would serve no useful purpose to permit individual landowners to intervene because under my theory of it they are represented by the irrigation districts.

"Mr. POWELL. That is right."

R. S. Reiersen, entered into a contract with Messrs. Moulton & Powell and J. K. Cheadle providing that “the District does hereby employ the Attorneys to represent it * * * and the Attorneys will give their best efforts and all time necessary to the proper preparation and presentation of the case in behalf of the District.” Compensation was to be on a contingent-fee basis. If the award did not exceed \$169,850 (the amount paid by the Government to satisfy the District’s bonded debt) appellees were to receive nothing. To the extent the award might exceed that amount, they were to be paid 30 percent of the first \$100,000, 20 percent of the next \$100,000, 10 percent of the third \$100,000 and five percent of all additional amounts (R. 4-6).

After trial of the condemnation proceeding, judgment was entered for the District for \$473,356 with interest.³ This was the value put by the jury on that part of the property condemned which in its judgment was “not devoted and applied to irrigation purposes.” And, on the assumption that this recovery was for the benefit of the former landowners, both parties appealed. The Government persisted in its contention that the judgment should be nominal in amount. The District on its cross-appeal clung to the assertion made in its overruled answer, i. e., that the

³ It will be recalled (see p. 3, *supra*) that the Government had filed a declaration of taking and deposited as estimated just compensation \$170,500, which was estimated to be enough to pay off the District’s bonded debt. (For that purpose \$169,850 was used. The remaining \$650 was paid to the District.) The judgment for \$473,346 gave the Government no credit for this deposit. This Court held that in this respect the trial court erred.

former landowners should recover the “value” of all the properties condemned.

This Court affirmed. 175 F. 2d 524. Disposing of the District’s cross-appeal, it said (p. 531): “We think that the [district] court looked through form to get at the substance of the claim, and that it did not err in regarding it as an effort to secure double compensation.” In respect of the Government’s appeal, it held that those beneficially entitled to the District’s assets could only get them when the District was dissolved in appropriate proceedings in the courts of Washington. It said (footnote 9, p. 529):

By directing that payment * * * be made to the District rather than to the landowners, the lower court left the question of disposition of this fund to be finally decided by the State court * * *. The rights of all parties are preserved under this procedure.

It added (p. 531):

Judge Driver was also aware that upon completion of the pending District disorganization proceeding in the State court, the proceeds of such a recovery, if authorized here, could not be retained by the District (it would pass out of existence) but would be delivered over to those entitled under State law to receive them. *This situation led the Government to assert that in any event its present ownership of all of the lands in the District made it, in effect, the real beneficiary of the trust. It may be assumed that Judge Schwollenbach so regarded this particular aspect of the case and we think*

that he reached a rational conclusion. (See footnote 9.)⁴

In other words, this Court read the judgment literally and not finding in it anything which purported to make the former landowners the equitable owners of the District's assets declined to share the parties' assumption that such was the case. On the contrary, it took the view that under state law the United States would turn out to be "the real beneficiary of the trust" when the District went out of existence as a result of dissolution proceedings in the state courts.⁵

The proceedings resulting in the order appealed from in the case at bar commenced when the trial court on receipt of this Court's mandate entered a modified judgment (R. 9-19) which was satisfied by the payment into the registry of \$422,252.80. They were initiated by a petition filed by Messrs. Moulton & Powell and J. K. Cheadle for the payment to them of \$78,918.85 (R. 2-4). The basis for the claim was the contract of August 30, 1946. It may be assumed that the amount asked for was computed in accordance with that contract.

⁴ Wherever in this brief italics are used, they have been added by the Government.

⁵ On November 8, 1949, the United States filed in the Superior Court of Benton County, Washington, a petition asking dissolution of the District and the appointment of a receiver to receive the assets and, after paying any debts, to pay the net to the United States. Its petition was dismissed and it appealed to the Supreme Court of Washington. The appeal was argued on November 13, 1950, and the decision is being awaited.

The petition gave rise to extended hearings. At their conclusion the trial judge stated he would not give effect to the contract (R. 310). He added:

It seems to me that the conclusion is inescapable that *at least at the time of the making of the 1946 contract the de facto directors were acting as trustees for the ultimate beneficiaries of the award paid for the District's property.* It was apparent to everybody at that time that for all practical purposes the District was out of business, that it would not ever again function as an irrigation district, and the only duty that the directors had was to protect the fund and bring in such funds as they could and protect it *for the benefit of the beneficiaries.* Those beneficiaries we do not yet, I think know who they will be. *It may very well be * * * that the money will be returned to the government.*

Finally, the trial judge said (R. 313):

* * * under the circumstances of this case, where the District has gone out of business, where the funds are being brought in as trust funds *for the benefit of beneficiaries* and the beneficiaries may very well be the Government in this case, I think that the court should be somewhat conservative * * * in the matter of the allowance of fees, and I think that even in these times of inflation \$50,000 is a good fee in a lawsuit.

The foregoing occurred on January 5, 1950. On February 27, 1950, the matter again came before the court. After stating that he had thought the Government would pay the \$50,000, the district judge

said that if instead it appealed he would “add 10 percent and make the fee \$55,000” (R. 321). As he finally put it (R. 322): “if the parties agree to have the money withdrawn in accordance with my previous ruling within ten days, then the \$50,000 will stand, otherwise an order may be taken fixing the fee at \$55,000.”

Since the Government did not recede from its position, the order was signed on March 10, 1940 (R. 32-33). This appeal followed (R. 34).

SPECIFICATION OF ERRORS

The statement of the points relied on by the United States on its appeal (R. 65-66) may be summarized as follows:

The district court erred:

1. In entering the order appealed from.
2. In holding that the appellees were entitled to be compensated for their legal services rendered in the condemnation proceedings against the Priest Rapids Irrigation District out of the sum paid in satisfaction of the judgment entered in that case.

ARGUMENT

I

The amount paid by the Government to satisfy the judgment in favor of the District in the condemnation proceeding cannot be depleted to pay the attorneys who opposed the Government in that proceeding

Unquestionably, the directors of a corporation which has ceased to do business and consequently is about to liquidate are under a duty to collect its assets for the benefit of its creditors and *cestuis*

que trustent. (Ordinarily the latter are stockholders; in the case at bar they are those who own the lands in the Irrigation district.) And in the fulfillment of that duty, they may employ—and pay—attorneys. It is also true that “where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts.” *Trustees v. Greenough*, 105 U. S. 527, 532–533 (1881). In making the order appealed from, the trial judge apparently invoked one or both of these principles. But neither is applicable here. For as the record in the condemnation case (No. 11,704) makes plain, Salvini and Reiersen did not in employing appellees act either as collectors of corporate assets for the benefit of whomsoever might turn out to be the equitable owners thereof or as representatives of a class—in which the Government was included—having a common interest in a trust fund.

The condemnation case was instituted by the Government’s petition contending it was the beneficial owner of the condemned property and that it could acquire the legal title thereto for a nominal consideration. Since the District had no creditors, the *de facto* directors were not obliged to oppose the petition. But, assuming they could, their opposition would not be on behalf of the *cestuis que trustent* but in the interest of claimants who disputed the Government’s assertion that it—and not they—were the equitable owners.

And that is precisely the position taken by Salvini and Reiersen. They employed appellees to oppose the Government's contention and to assert that the former owners of lands in the District had equitable title to the condemned property and that the Government was obligated to pay them many hundreds of thousands of dollars therefor.⁶

Therefore, if the Government is the owner of the District's assets (the \$422,252.80 deposited by it in satisfaction of the judgment) that money cannot be levied on to pay appellees. Certainly the Government derived no benefit from making the deposit. Consequently it was not benefited by the services of appellees compelling it to do so.

Yet the order appealed from would require it to pay for those services. The district judge recognized that the question whether the United States or the former owners are entitled to the fund has not yet been determined and "may very well be" decided in favor of the United States. But in his view, even if the United States does own the money, it must pay \$55,000 of it to the appellees for contesting its ownership! This is plainly wrong. For "where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such

⁶ The fact that the opposition was made in the name of the District, instead of the individual claimants, did not change its character. *Mason v. Pewabic Min. Co.*, 66 Fed. 391, 395, *et seq.* (C. A. 6, 1894).

person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.” *Hobbs v. McLean*, 117 U. S. 567, 582 (1886). *Mason v. Pewabic Min. Co.*, 66 Fed. 391, 395, *et seq.* (C. A. 6, 1894); *Brown v. Pennsylvania R. Co.*, 250 Fed. 513, 524 (C. A. 3, 1918). So here, if appellees fail in their purpose to take from the Government possession of the \$422,252.80, they have no right to demand payment for their services from the property they sought to misappropriate.

In reaching the conclusion which led to the order, the district judge misread the record. Thus, he said that “*at least* at the time of the making of the [August 30] 1946 contract the de facto directors were acting as trustees for the ultimate beneficiaries of the award paid for the District’s property” (R. 310). Of course, that is not so. The contract of August 30, 1946, was entered into long after appellees had been employed by Salvini and Reiersen and was evidently designed to fix their fees in the event they were successful in their contention.

Thus, long before the contract was made the de facto directors and the appellees were committed to a position adverse to the United States. On February 12, 1945, appellees had filed the answer contending that the former owners were entitled to recover from the Government the sum of \$1,060,685 (R. 11,704, pages 161–167, p. 4 *supra*). On September 21, 1945, after this answer had been overruled, they filed the answer upon which the case was tried (R. 11,704, pages 182–191). Therein they claimed that the former

owners were entitled to recover from the Government \$847,815 (R. 11,704, pages 187–188, pp. 4–5 *supra*). On June 26, 1946, the trial court declined to permit the former owners of a 10-acre tract within the District to intervene in the condemnation proceeding and claim a right to be paid for the properties on the ground—recognized by the court and avowed by one of appellees—that the would-be intervenors and all other former owners were represented by the District (R. 11,704, pages 289–290, p. 6, fn. 2 *supra*). Obviously, the trial judge was wrong in thinking that on August 30, 1946—two months after he had refused to permit former landowners to intervene—the de facto directors were still undecided or neutral in the contest between the former owners and the Government.

Accordingly, it is submitted that the order awarding appellees \$55,000 of the \$422,252.80 is erroneous and should be reversed.

II

The District Court was without jurisdiction to entertain the petition for payment of attorneys' fees

It is, of course, elementary that the jurisdiction of a federal court must affirmatively appear. As this Court said in *United States v. Green*, 107 F. 2d 19, 22 (1939):

The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record.

And see *Wells v. Long*, 162 F. 2d 842, 844 (C. A. 9, 1947). The record in the instant proceeding fails to disclose that the district court had jurisdiction to entertain appellees' application for attorney fees.

The fact that the Government had instituted a condemnation suit in that court did not confer jurisdiction. The condemnation suit has been concluded by the entry of judgment and all that remains for the trial court to do is to distribute the \$422,252.80 to those found to be entitled thereto. But appellees are not parties to the distribution proceedings. They did not have any interest in the condemned property and consequently have no claim against the award. Indeed they do not contend that they have such an interest.

It thus appears that their petition for payment of fees must be treated as a new and separate suit. Whether considered as against the District, its *de facto* directors, the former owners or the United States, its institution is not sanctioned by any statute of which the Government has knowledge. Unless the appellees—whose petition is silent on the point—can produce statutory authority for the exercise of jurisdiction by the trial court, the order appealed from must be reversed and the cause remanded with directions to dismiss the petition.

CONCLUSION

For the foregoing reasons, it is submitted that the order appealed from should be reversed.

Respectfully,

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DECEMBER 1950.

United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MOULTON & POWELL AND J. K. CHEADLE, APPELLEES

MOULTON & POWELL AND J. K. CHEADLE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*Upon Appeals from the United States District
Court for the Eastern District of Washington*

BRIEF FOR APPELLEES AND
CROSS APPELLANTS

MOULTON & POWELL,
Kennewick, Washington

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*Attorneys for Appellees and
Cross-Appellants*

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BRIEF FOR APPELLEES AND
CROSS APPELLANTS
OPINIONS BELOW

The district court did not write an opinion. Two oral opinions of Judge Driver appear at R. 310-313 and R. 320-322.

JURISDICTION

The pending appeal and cross appeal were taken from an order signed and entered by Judge Driver on March 10, 1950 (R. 32-33), in the cause which in the district court is entitled *United States of America, Petitioner v. Clements P. Alberts, et al., and Priest Rapids Irrigation District, a municipal corporation of the state of Washington, Defendants*, No. 128-99 (R. 2). That is a condemnation proceeding in which the Government on February 23, 1943 invoked the jurisdiction of the district court under the Act of August 18, 1890 (26 Stat. 316), as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U.S.C. sec 171) and section 201 of the Act of March 27, 1942 (56 Stat. 176, 177, 50 U.S.C. sec. 171 (a)). (R. 11704, page 2, 7) — [As provided by order of this Court in this appeal (R. 330-331), the three volume printed record in an earlier appeal (No. 11,704) in the same proceeding is a portion of the transcript of record in this appeal, and references in this brief to the record in the earlier appeal are

as follows: "R. 11704, page" References to the record printed in connection with this appeal are as follows: "R."]

From the judgment on verdict in that condemnation proceeding (R. 11704, pages 1147-1158, 1161-1163), the Government in 1947 appealed and the Priest Rapids Irrigation District cross appealed; and this Court in 1949 disposed of those appeals by its decision in *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524.

The district Court's jurisdiction of the matter involved in the pending appeal and cross appeal is the ancillary or incidental jurisdiction which the district court has by reason of its jurisdiction invoked and exercised in the federal condemnation proceeding, and by reason of the proceeds of the condemnation award being in the district court.

The jurisdiction of the district court also appears in the judgment which this Court affirmed (175 F. 2d 524, 533) with a modification. The modified judgment (R. 9-19) was entered by Judge Driver on November 21, 1949. Both the judgment on verdict (R. 11704, page 1163) which was previously reviewed by this Court and the modified judgment (R. 18) provided that the condemnation judgment be paid into the district court and "remain subject to the orders of this [United States District] Court" until such time as the district court should order payment to the Superior Court

of the State of Washington in and for Benton County for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said state court.

On March 10, 1950, when Judge Driver entered the order directing withdrawal of \$55,000 from the deposit of \$422,252.80 for the benefit of the Priest Rapids Irrigation District, for the payment of attorney fees (R. 33) notice of this appeal was filed (R. 34). Later, on March 30, 1950 notice of cross-appeal was filed (R. 37).

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1291.

STATEMENT OF THE CASE

This is the one brief of appellees and cross appellants, the appeal and cross appeal having been consolidated for briefing purposes by stipulation filed in this Court.

The Government's "statement" (App. Br. 2-11) is controverted as being incomplete and largely irrelevant.

The Government having questioned in its brief (App. Br. 15-16) the jurisdiction of the district court, this statement first refers to matters of record which bear on the jurisdictional question.

In 1949 this Court decided an appeal and cross appeal in the federal condemnation proceeding,

United States v. Priest Rapids Irr. Dist., 175 F. 2d 524. The record in that case shows that the district court's March 7, 1947 judgment on verdict (R. 11704, pages 1147-1158, 1161-1163) contained a paragraph (R. 11704, page 1163) which provided as follows:

"It Is Further Ordered, Adjudged and Decreed that the judgment, and the whole thereof, *shall be paid into this court and remain subject to the orders of this Court* until such time as this Court shall order the payment of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and" (Italics added)

The provisions of that paragraph were not attacked by the Government's statement of points on appeal (R. 11704, page 1169), nor by the Government's specification of errors, contained in its brief submitted to this Court in that earlier appeal.

In that earlier appeal, the majority opinion of this Court did take note of the provisions of that paragraph. In *United States v. Priest Rapids Irr. Dist.*, 175 F. (2d) 524, 528, footnote 9, this Court stated:

"Entirely aside from the question of the validity of the compensation award, we think that the court did not err by directing in its judgment that the amount of the award should be paid into the lower court *there to remain subject to the orders of the court* until such time

as the court should order payment of the same to the Superior Court of the State of Washington for Benton County, for the use and benefit of the District in liquidation proceedings ‘to be maintained’ in said Superior Court. (See reference in this opinion to provision in Washington laws relating to ‘Disorganization’ proceedings.) By directing that payment of the award to be made to the District rather than to the landowners, the lower court left the question of disposition of this fund to be finally decided by the State court under applicable state law in the so-called ‘Disorganization’ proceedings pending in the State court. (See *Horse Heaven* case, *supra*.) The rights of all parties are preserved under this procedure.” (*Italics added*)

In deciding that earlier appeal and cross appeal, this Court concluded that the record did not sustain the attack on the Schwellenbach formula (175 F. (2d) 524, 531). This Court concluded further (175 F. (2d) 524, 532-533) that Judge Driver had followed and applied the Schwellenbach formula except as to the application of the \$170,500 payment made by the Government, the three concluding paragraphs of the majority opinion reading as follows:

“We are convinced that the final judgment must be modified if it is to conform to the basic theory on which this case was tried. In this conclusion we have due regard for the interpretation of the Schwellenbach formula as expressed in the various trial rulings of both judges below. (See text of Judge Schwellenbach ruling immediately preceding footnote 10.)

“For the reasons above stated the lower court was in error in failing to provide in the judgment that the \$170,500 paid by the Government should be applied as a credit against the award of \$473,356. Judgment against the Government for \$302,856 should have been entered.

“The case is remanded with directions to the lower court to modify the judgment in accordance with the foregoing views.”

Neither the Government nor the Priest Rapids Irrigation District petitioned this Court for a rehearing. Neither the Government nor the District sought to have this Court’s decision reviewed by the Supreme Court of the United States. And in due course the mandate of this Court was received by the district court which entered the modified judgment on November 21, 1949 (R. 9-19).

The two pertinent paragraphs of the modified judgment (R. 18) read as follows:

“It Is Further Ordered, Adjudged and Decreed that *the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation*, and that there be and hereby is entered against the petitioner, the United States of America, and in favor of the defendant Priest Rapids Irrigation District, a judgment for the difference between \$473,356.00 and \$170,500.00, which judgment shall bear interest at the rate of 6% per annum on \$473,356.00 from October 1, 1943, until May 12, 1944, and at the rate of 6% per annum on \$302,856.00 from May 12, 1944, until paid, and

“It Is Further Ordered, Adjudged and Decreed that said deficiency judgment of \$302,856.00, together with interest as above ordered, and the whole thereof, *shall be paid into this Court and remain subject to the orders of this Court until such time as this Court shall order the payment of the balance of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and*” (Italics added)

The Government did not contend, by a new appeal or writ of mandamus or any other method, that the modified judgment failed to conform to the mandate of this Court. The modified judgment became final. The deficiency judgment, including interest, in the sum of \$422,252.80 was paid into court (R. 32).

On the same date that the modified judgment was entered, November 21, 1949, two petitions were served on Government counsel and filed in the condemnation proceeding. They were the petition for payment of attorneys' fee (R. 2-8) and the petition for payment of certificates of indebtedness (R. 19-30).

Both petitions came on for hearing before Judge Driver in the condemnation proceeding (R. 67) on January 5, 1950 (R. 68). The Government made no jurisdictional objection or other objection to payment of the certificates of indebtedness (R. 68-72), Government counsel stating that he would

“interpose no objection whatever to an allowance from the funds in this court for the payment of those certificates of indebtedness.” (R. 69) One recital in the proposed order was stricken at the Government’s request (R. 72); and the order for payment of certificates of indebtedness was approved by Government counsel, and entered by Judge Driver on January 6, 1950 (R. 30-31).

At the January 5 and 6, 1950 hearings on the petition for payment of attorneys’ fee, there was considerable evidence adduced—exhibits, testimony and stipulated evidence (R. 73-246, 264-266) in support of the petition for payment of the contract fee of \$78,918.85, which the Priest Rapids Irrigation District’s board of directors had approved and consented to by resolution (R. 79-80).

The district court, prior to the hearing, had indicated in a conference in chambers that, regarding the petition for payment of attorneys’ fee, it might be well to have supporting testimony (R. 126).

Two witnesses for the Government testified as to reasonable compensation (R. 247-263).

The Government never filed any pleading responsive to the petition. Points and authorities in support of the petition were filed on January 5, 1950 (R. 39-64). As the record shows, a day or two before the hearing Government counsel received the supporting points and authorities, and on the

same date Government counsel mailed out the Government's points and authorities (R. 315). A statement by the court shows that both the supporting and objecting points and authorities were received and read by the court (R. 266-267).

Judge Driver's oral decision on January 6, 1950 (R. 310-313) to allow a fee of \$50,000.00 was made upon a basis substantially in accordance with Government counsel's concluding concession and submission to the court (R. 309). Government counsel stated:

"I submit to the court that these petitioners are entitled to a reasonable attorney fee, that these contracts should be completely disregarded, and this court should fix what constitutes reasonable compensation to these petitioners for their services on behalf of the District in this case."

The court gave permission for adducing further evidence on the basis adopted by the court "what would be a fair and reasonable fee in the absence of contract." (R. 315) In granting that permission, the court reserved the right to go up or down from \$50,000, in the event the matter were reopened (R. 315).

On February 27, 1950, the matter was reopened, as the court stated, "for the purpose of supplementing the record by the offer of additional proof as to the reasonable value of the services of the attorneys under the theory that the court adopted."

(R. 317) The additional evidence was stipulated (R. 317-319).

The Government's contention (App. Br. 15-16) that the district court did not have jurisdiction to entertain the petition for payment of attorneys' fee developed after the January 5 and 6 hearing and decision. Indication of that contention first appeared of record on February 27, 1950. Even then, the indication was not given by Government counsel, but by one of appellees, Mr. Powell, who mentioned to the court what he had learned in a discussion in Washington, D. C. with attorneys of the Department of Justice—that they felt there was no jurisdiction in the court to entertain a petition of this kind (R. 319).

The court (R. 320-322), upon the basis of the additional evidence, and aside from consideration of the Government's indicated intention to appeal, fixed the amount of \$55,000 as the amount to be withdrawn for payment of attorneys' fee—unless the Government agreed to withdrawal of \$50,000 within ten days.

On March 10, 1950 the court signed the order (R. 32-33) for withdrawal of \$55,000. When the order was presented, Government counsel stated (R. 323) that “the government would like the record to show that the government objects to the allowance of attorneys' fees in this case in the sum of \$55,000, or any other sum.” At the same time the Government filed notice of appeal and obtained an

order staying the proceeding (R. 323-324, 34-37).

Later, on March 30, 1950, notice of cross-appeal was filed (R. 37).

CROSS-APPELLANTS' SPECIFICATION OF ERRORS

The district court erred:

1. In ruling that payment of the attorneys' fee should not be made in accordance with the petition and with the resolution of the Priest Rapids Irrigation District's board of directors approving and consenting to payment of the contract attorneys' fee in the amount of \$78,918.85 from the \$422,252.80 paid into the district court in satisfaction of the condemnation judgment in favor of said District.

2. In failing to conclude, upon consideration of all relevant matters, that \$78,918.85 is appropriate and reasonable compensation for the services in this condemnation action which have been performed by the attorneys for the Priest Rapids Irrigation District on what was necessarily a contingent basis.

3. In failing to order that \$78,918.85 be withdrawn from the District's fund of \$422,252.80 for the benefit of the Priest Rapids Irrigation District, for payment of attorneys' fee to cross-appellants.

SUMMARY OF ARGUMENT

Appellees' Argument in Answer to Appellant's Brief

- I The District Court had jurisdiction to entertain the petition for attorneys' fee.
- II From the fund in the District Court, \$422,252.80 paid into court in satisfaction of the condemnation judgment against the Government and in favor of the Priest Rapids Irrigation District, a withdrawal can be made for compensating the District's attorneys for their services in the condemnation proceeding—the District approving and consenting to the withdrawal.

Cross-Appellants' Argument on Cross-Appeal

- I Withdrawal from the fund and payment of attorneys' fee should have been ordered in accordance with the contingent fee contract, as approved and consented to by the District.
- II Alternatively, the District Court should have allowed \$78,918.85 as attorneys' fee, upon the basis of reasonable value of services, without regard to any contract, but giving consideration to the necessarily contingent character of compensation.

APPELLEES' ARGUMENT
IN ANSWER TO APPELLANT'S BRIEF

I

The District Court had jurisdiction to entertain the petition for payment of attorneys' fee.

Appellees recognize that a question of the district court's jurisdiction, whether properly raised or not, must be decided by this Court. *Jones v. Brush*, 9 Cir., 143 F. 2d 733, 734. Appellees also recognize that this Court on its own volition may raise and decide a jurisdictional question, and that when considered, a jurisdictional question receives first consideration. — Accordingly, the jurisdictional question raised in the second part of appellant's brief (App. Br. 15-16) is answered first in this brief of appellees and cross-appellants.

Appellees submit that the district court's jurisdiction of this matter now on appeal (and of similar matters) was adjudicated by the judgment on verdict (R. 11704, pages 1147-1158, 1161-1163) and the modified judgment (R. 9-19), and that the Government can not now question that jurisdiction.

Appellees further submit that this matter now on appeal is within the scope of the well established ancillary or incidental jurisdiction of the district courts of the United States.

'The judgment on verdict adjudged "that the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation * * *." (R. 11704, page 1157). 'The judgment on verdict further provided (R. 11704, page 1163):

"It Is Further Ordered, Adjudged and Decreed that the judgment, and the whole thereof, shall be paid into this court *and remain subject to the orders of this Court* until such time as this Court shall order the payment of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and" (Italics added)

The above quoted paragraph of the judgment on verdict did not escape the Government's attention in March 1947, when the judgment was entered. Quite the contrary. That paragraph had the Government's particular attention. Originally that paragraph of the judgment (R. 11704, page 1157) provided:

"It Is Further Ordered, Adjudged and Decreed that said deficiency judgment, and the whole thereof, shall be paid into the Superior Court of the State of Washington, in and for Benton County, to be distributed in liquidation proceedings in said Court for dissolution of the

Priest Rapids Irrigation District, and that pending determination by said Superior Court as to the parties entitled to receive the funds comprising said judgment with interest, the proceeds of said judgment shall be held in this Court subject to payments therefrom for purposes of meeting the expenses of said Priest Rapids Irrigation District in this condemnation action and in said dissolution proceeding upon authority for said payments by said district, approved by the Superior Court of the State of Washington in and for Benton County, and by this Court, and”

And six days after the judgment was entered (R. 11704, page 1159-1160), the Government moved to strike that particular paragraph of the judgment

“upon the grounds and for the reason that said Paragraph improperly directs that the deficiency judgment in this proceeding be paid into the Superior Court of the State of Washington, in and for the County of Benton, instead of into the registry of this court, and further improperly provides for payments to be paid from said sum only upon the approval of said Superior Court of the State of Washington, in and for the County of Benton.”

The Government insisted that the judgment against the United States provide for payment into the district court. The Government objected to the provision that payments from the fund should be approved by the state court. The Government did *not* object to the provision that payments from the fund be upon approval or order of the district court.

The Government did *not* object to the substituted paragraph (R. 11704, page 1163) which omitted any requirement that the state court approve payments from the fund while held in the federal court, and which provided that pending payment of the fund to the state court in the liquidation proceeding, the proceeds of the condemnation award should “remain subject to the orders of this [United States District] Court” alone.

The Government in its appeal from the condemnation award did not claim any error in that paragraph of the judgment on verdict. Subsequent to the decision of this Court in *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524, the Government did not in any way question the pertinent paragraph of the modified judgment which reads as follows (R. 18):

“It Is Further Ordered, Adjudged and Decreed that said deficiency judgment of \$302,856.00, together with interest as above ordered, and the whole thereof, shall be paid into this Court and *remain subject to the orders of this Court until such time as this Court shall order the payment of the balance of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and*” (Italics added)

Obviously, that paragraph was in accordance with the mandate of this Court, for this Court had stated

in its majority opinion (175 F. 2d 524, 528, footnote 9):

“Entirely aside from the question of the validity of the compensation award, *we think that the court did not err by directing in its judgment that the amount of the award should be paid into the lower court there to remain subject to the orders of the court until such time as the court should order payment of the same to the Superior Court of the State of Washington* for Benton County, for the use and benefit of the District in liquidation proceedings ‘to be maintained’ in said Superior Court. (See reference in this opinion to provision in Washington laws relating to ‘Disorganization’ proceedings.) By directing that payment of the award to be made to the District rather than to the landowners, the lower court left the question of disposition of this fund to be finally decided by the State court under applicable state law in the so-called ‘Disorganization’ proceedings pending in the State court. (See *Horse Heaven* case, *supra*.) The rights of all parties are preserved under this procedure.” (Italics added)

This Court’s decision in *O. F. Nelson & Co. v. United States*, 169 F. 2d 833, is authority for the following statements. When a court renders judgment it tacitly asserts, if it does not do so expressly, that it has jurisdiction to render the judgment. Whether a particular issue, such as jurisdiction, was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. The tacit or express adjudication in a judg-

ment, that the court has jurisdiction to render the judgment, may be questioned directly by appeal. But it can not be attacked collaterally. *Res judicata* applies to jurisdiction, even though the jurisdictional point was not raised or pressed in connection with the earlier judgment. — The foregoing statements in this paragraph are paraphrased (almost quoted verbatim) from this Court's opinion in *O. F. Nelson & Co. v. United States, supra*. In that opinion, this Court referred to and quoted from a number of precedents, including *Jackson v. Irving Trust Co.*, 311 U. S. 494, 61 S. Ct. 326, 85 L. Ed. 297.

The Government in its 1947 appeal to this Court, or in a petition to the Supreme Court for writ of certiorari, could have questioned whether the district court had jurisdiction to include in the judgment on verdict the provision that, pending payment to the state court in the liquidation proceeding, the proceeds of the condemnation award would be held in the federal district court "subject to the orders of this [United States District] court." The Government did not then attack that jurisdiction directly. The Government can not now attack that jurisdiction. On that jurisdictional matter, the modified judgment (R. 9-19) of November 21, 1949 is conclusive.

The district court must be deemed to have decided the jurisdictional question in the main condemnation proceeding, in which the district court provided in its judgment that the fund would be

subject to the orders of the court. And that jurisdictional question can not be attacked collaterally in this ancilliary proceeding. *Connett v. City of Jerseyville*, 7 Cir., 125 F. 2d 121, 125.

Appropos the Government's contention in the pending appeal that the district court had no authority to retain the fund subject to the orders of the district court—appellees quote what this Court stated in rejecting the Government's untimely jurisdictional contention in *O. F. Nelson & Co. v. United States*, 169 F. 2d 833, 834:

“It is not necessary for us to resolve this dispute, even assuming that the United States is correct in its long delayed contention.”

However, the Government is wrong on the merits of its long delayed jurisdictional contention.

The district court had ancillary or incidental jurisdiction to entertain the petition for payment, which was approved and consented to by the Priest Rapids Irrigation District's board of directors. (R. 79-80) The district court had jurisdiction of the condemnation proceeding instituted by the United States (R. 11704, page 2). The judgment of \$422,-252.80 against the United States and in favor of the District was paid into the district court, and the fund is still there (R. 32). The fact that the fund is in the district court gives rise to that court's ancillary or supplemental jurisdiction.

Where a federal court, in the exercise of its jurisdiction in a principal case, has money or property in the custody of the court, it may entertain a petition for payment of attorneys' fee in the exercise of ancillary or supplemental jurisdiction. *Moore Bros. Const. Co. v. City of St. Louis*, 7 Cir., 159 F. 2d 586, 588; *O'Hara v. Oakland County, et al.*, 6 Cir., 136 F. 2d 152, 155; *Continental Casualty Co. v. Kelly*, Dist. Col. 106 F. 2d 841, 843.

The parties invoking the ancillary jurisdiction of the federal district courts in condemnation cases do not have to have had an interest in the condemned property, as the Government at least inferentially argues (App. Br. 16).

In fact, the United States itself, through its Collector of Internal Revenue, has invoked the ancillary jurisdiction of federal district courts in condemnation cases, in which the Collector of Internal Revenue had no interest in the condemned property.

In *United States v. 52.11 Acres of Land, Etc.*, D. C., E. D., Mo., 73 F. Supp. 820, 823, the condemnation award included approximately \$4000 representing indebtedness of the landowners to one McDowell. A creditor of McDowell obtained a judgment against him in state court and started garnishment proceedings against the landowners. Subse-

quently a federal Collector of Internal Revenue assessed taxes against McDowell, but served notices of liens, etc. on the landowners after commencement of the garnishment proceedings. In the condemnation proceeding, the creditor and the United States (Collector of Internal Revenue) contested their respective claims to the money on deposit in the federal court to the credit of McDowell. The court held that the creditor's claim was senior in point of time and the court ordered the funds paid to the creditor.—In *United States v. Certain Lands, Etc.*, D. C., E. D., Mo., 71 F. Supp. 76, there was a comparable situation in another condemnation case, in which the same person, McDowell, had assigned his portion of the condemnation award to his attorney as security for payment for services. The attorney's rights as assignee of McDowell were held to be superior to those of the Collector of Internal Revenue of the United States.—In still another "McDowell" case, *National Refining Co. v. United States*, 8 Cir., 160 F. 2d 951, 954, 955, still another assignee of McDowell prevailed over the United States' Collector of Internal Revenue, the appellate court reversing the district court. Incidentally, it may be noted that the court of appeals there held that the assignment by McDowell did not involve any violation of 31 U.S.C.A. 203, the statute regarding assignments of claims against the United States.

In the “McDowell” cases, *supra*, the United States’ Collector of Internal Revenue was not a party to the condemnation actions, nor were McDowell’s creditor, his attorney or his other creditor assignee. — Nor was the village of Highlands, N. Y., which took an assignment of a condemnation award from an owner of condemned lands in payment of taxes on *other* land which was not condemned, and collected from the condemnation award. *United States v. Certain Lands in T. of Highlands, N. Y.*, D. C., S. D., N. Y., 49 F. Supp. 962, 965. — They did not have to be parties to the condemnation actions, or have interests in the condemned properties, in order to invoke the ancillary or incidental jurisdiction of the district courts relating to the moneys paid into those courts in satisfaction of condemnation judgments.

Incidentally, the appellees and cross appellants undoubtedly became equitable assignees of \$78,918.85 of the \$422,252.80 paid into the district court in favor of the Priest Rapids Irrigation District, in view of the contingent fee contract (R. 76-78) coupled with the November 21, 1949 resolution of the District’s board of directors approving and consenting to payment of the contract fee from the fund in the district court (R. 79-80). — The attendant facts and circumstances shown in the record more clearly show an equitable assignment than did the facts and circumstances in *Sundstrom v. Sundstrom*, 15 Wn. 2d 103, 108, 129 P. 2d 783, in

which the state court found an equitable assignment under its announced rule that:

“What amounts to a present appropriation constituting an equitable assignment is thus a question to be gathered from a consideration of the language used, in the light of all the attendant facts and circumstances.”

However, the jurisdiction of the district court to entertain the petition did not depend upon the District's attorneys having an equitable assignment. Nor did it depend upon whether those attorneys petitioned directly or through the District.

In *O'Hara v. Oakland County, et al.*, 6 Cir., 136 F. 2d 152, the main case involved the validity of drainage bonds, which were held to be invalid. In the course of the proceeding drainage assessments in the sum of \$133,000 accumulated and came into the custody of the federal district court. The attorney, whose services were principally responsible for obtaining the decree of invalidity petitioned for payment of attorney fee. An allowance by a master of a \$30,000 fee from the \$133,000 was made. However, the district court dismissed the petition for payment of attorney fee because the court thought it had no authority to compensate the attorney out of the fund. The appellate court reversed the dismissal and directed that the fee be paid. In the course of its opinion the court said (136 F. 2d 152, 155):

“The allowance does not depend upon whether petitioner’s client, Oakland Hills, and Oakland County were aligned in interest upon the same or opposite sides of the litigation, or upon whether petitioner’s application was made by him directly to the court or through his client, or whether the litigation was by classes or otherwise; or in what particular manner the fund was created. These were all mere formalities. See *Sprague v. Ticonic Bank*, *supra*, (307 U. S. at page 167; *Colley v. Wolcott*, 8 Cir., 187 F. 595).”

Berman v. Palmetto Apartments Corporation, 6 Cir., 153 F. 2d 192, 194 is to the same effect.

It is clear from the record on this appeal and from the authorities cited that: (1) The district court’s jurisdiction to entertain the petition was conclusively adjudicated in the condemnation judgment which provides that the fund shall “remain subject to the orders of this [United States District] Court”, and the Government can not now question that jurisdiction. (2) In any event, the district court, having jurisdiction of the main condemnation proceeding and having custody of the \$422,252.80 paid in satisfaction of the judgment in favor of the Priest Rapids Irrigation District, had ancillary or supplemental jurisdiction to entertain the petition and enter the order from which the Government appealed.

II

From the fund in the District Court, \$422,252.80 paid into court in satisfaction of the condemnation judgment against the Government and in favor of the Priest Rapids Irrigation District, a withdrawal can be made for compensating the District's attorneys for their services in the condemnation proceeding—the District approving and consenting to the withdrawal.

In the first part of appellant's brief (App. Br. 11-15), the Government contends that no withdrawal from the \$422,252.80 fund in the district court can be made for the purpose of compensating the Priest Rapids Irrigation District's attorneys for their services in the condemnation litigation which resulted in the judgment in favor of the District.

However, in the district court, Government counsel concluded presentation of the Government's position with the following concession and submission (R. 309):

“I submit to the court that these petitioners are entitled to a reasonable attorney fee, that these contracts should be completely disregarded, and this court should fix what constitutes reasonable compensation to these petitioners for their services on behalf of the District in this case.”

And the district court decided the matter substantially in accordance with that concession and submission (R. 310-313).

Appellees submit that it is too late for the Government to disaffirm that concession now. *Shanley, et al. v. Bowers*, 2 Cir., 81 F. 2d 13, 15-16; *Aetna Life Ins. Co. v. Carrillo*, 5 Cir. 164 F. 2d 883, 884.

Incidentally, it is worth noting that in the district court the Government likewise conceded that there should be an allowance from the fund for payment of certificates of indebtedness which had been issued by the District to meet "necessary expenses of the District, exclusive of attorney fees, in the defense of said condemnation action, * * *." (R. 24, 19-31, 68-72) Regarding payment of those certificates of indebtedness, Government counsel stated to the district court (R. 69): "I think I shall interpose no objection whatever to an allowance from the funds in this court for the payment of those certificates of indebtedness."

If the Government in this Court is permitted to disaffirm its concession made in the district court, the Government's appellate contention (App. Br. 11-15) should be rejected on the merits.

The Priest Rapids Irrigation District is "the only person having an interest in and to the compensation" amounting to \$422,252.80. It was so adjudicated in the judgment on verdict (R. 11704, page 1157) which this Court affirmed, except for

a modification in the amount of the judgment, *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524, 533. The modified judgment (R. 9-19) provides as follows (R. 18):

“It Is Further Ordered, Adjudged and Decreed that *the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation, and that there be and hereby is entered against the petitioner, the United States of America, and in favor of the defendant Priest Rapids Irrigation District, a judgment for the difference between \$473,356.00 and \$170,500.00, which judgment shall bear interest at the rate of 6% per annum on \$473,356.00 from October 1, 1943, until May 12, 1944, and at the rate of 6% per annum on \$302,856.00 from May 12, 1944, until paid, and*” (Italics added)

The italicized part of the above quoted paragraph is identical with the comparable paragraph of the judgment on verdict (R. 11705, page 1157), which this Court affirmed, with a modification in the amount of the judgment.

The District, “the only person having an interest in and to the compensation” fund of \$422,252.80, approved and consented (R. 79-80) to payment from the fund of the contingent contract fee, \$78,918.85. Regarding the petition for payment of that contract fee, Judge Driver stated (R. 267):

“the thing that primarily concerns me are the objections raised by the Government. In the absence of those objections I should be inclined to grant the petition, of course.”

The Government's appeal and argument (App. Br. 11-15) presents no basis for reversing Judge Driver's order which was made upon consideration of the Government's objections (R. 310-313).

Moreover, the Government as the condemnor of the District's non-irrigation properties had no standing to raise any objection. It would be anomalous if a condemnor which had been subjected to a deficiency judgment, including interest, of \$422,252.80 could be heard to contend that the defendant's attorneys, with the defendant's approval and consent, could not be paid any attorney fee from the \$422,252.80 paid into court in satisfaction of the judgment.

It is further submitted that the Government, as a claimant to either all or some of the assets of the Priest Rapids Irrigation District in State court liquidation proceedings, could not properly object in the district court to a withdrawal from the fund for compensating the District's attorneys for their services in the condemnation proceeding.

For reasons and authorities hereinafter set forth, the Government's appellate argument (App. Br. 11-15) would be untenable—even if the Washington Supreme Court had upheld the Government's con-

tention that the Government, as a matter of state law, is entitled to the net assets of the Priest Rapids Irrigaion District.—*However, on December 14, 1950 the Washington supreme court in an en banc decision rejected the Government's contention. United States of America v. Priest Rapids Irrigation District*, 137 Wash. Dec. 583, 225 P. 2d 202. For the convenience of this Court the opinion in that case is printed as an appendix of this brief (Appendix A, pp. 54-62, *infra*).

On the issue, “Is the United States entitled to the net assets of the District on its dissolution?”, the court ruled against the Government, stating, “We have no hesitancy in determining that issue contrary to the contention of the United States.” 137 Wash. Dec. 583, 587, 588, 225 P. 2d 202, 205.¹

In January and February, 1950, in fixing \$55,000 as the amount of attorneys' fee to be allowed the District's attorneys from the fund in the federal district court, Judge Driver took into consideration the possibility that in the then pending State court

[1] The Government in its brief (App. Br. 9, Footnote 5) refers to that state court case and states “the decision is being awaited.”—As the records and files of the Clerk of this Court, re C.A. 9, No. 12563, show, the Department of Justice with its letter of December 21, 1950 to the Clerk of this Court enclosed page proof of the Government's brief. Appellees on December 14, 1950 telegraphed to the Department of Justice advising of the state court decision, stating that a copy of the opinion was being air mailed to the Department of Justice and stating that in connection with the Government's brief and pending appeal the Government “may want to consider state decision. If so we agreeable to 10 days' or two weeks' extension time to file your brief.” And on December 15 appellees wrote to the Clerk of this Court enclosing copy of said telegram.—It is regrettable that the December 14, 1950 decision of the Washington supreme court is not referred to in the Government's brief.

action commenced by the Government (R. 163-173) against the District and its officials: "It may very well be that the Government will be paid back under the *In Re Horse Heaven* case, the doctrine in that case, that the money will be returned to the Government" (R. 310-311).—Judge Driver allowed \$55,000 as the amount to be withdrawn from the fund for payment of the District's attorneys in the condemnation proceedings, upon consideration of the Government's contention that as a matter of State law it had the exclusive right to the net assets of the Priest Rapids Irrigation District. Judge Driver made that determination prior to May 2, 1950 when the superior court for Benton County dismissed the Government's State court action, with prejudice, in a judgment in which the superior court judge held that the Government "has no interest whatever in the assets of the Priest Rapids Irrigation District * * *," 137 Wash. Dec. 583, 587, 225 P. 2d 202, 205. A certified copy of the superior court's May 2, 1950 decree and order of dismissal has been placed in the hands of the Clerk of this Court. For the convenience of this Court, that decree and order of dismissal is printed as an appendix of this brief (Appendix B, pp. 62-71, *infra*). Judge Driver's decision in the fee matter was likewise before the December 14, 1950 en banc decision of the Washington supreme court which affirmed the superior court's judgment of dismissal, modified to read that the Government "has no

exclusive interest in the assets of the Priest Rapids Irrigation District * * *'' 137 Wash. Dec. 583, 589, 225 P. 2d 202, 206. The Washington supreme court carefully refrained from passing on the question

“even by inference, as to whether, when an owner of land in the district acquired an interest in its non-irrigation properties on the *de facto* dissolution of the district [probably February 23, 1943; certainly not later than April 1, 1943], and thereafter sold and conveyed his land to the United States, he thereby transferred his interest in the non-irrigation properties to the United States.

“If both such former owner and the United States come into court claiming a portion of the net assets on the basis of that interest, the court would, in the dissolution proceeding, determine whether the owner had transferred that interest to the United States or had retained it.

“The superior court may well be right in that portion of the judgment appealed from wherein it adjudged and decreed ‘that the United States of America, plaintiff herein, has no interest whatever in the assets of the Priest Rapids Irrigation District,’ but it seems to us that the court went beyond the determination of the issue properly before it at the time the order of dismissal was entered, that issue being whether the United States was entitled to *all* the net assets of the district available for distribution.” (137 Wash. Dec. 583, 588, 225 P. 2d 202, 206.)

Since Judge Driver ordered a withdrawal of \$55,000 for payment of the District’s attorneys for their services in the condemnation action, upon

consideration of the then pending and undetermined contention by the Government in the State court that the Government was entitled to all of the assets of the Priest Rapids Irrigation District, it is obvious that the Government's contention (App Br. 11-15) has been completely undermined by the subsequent decisions of the state courts.

It should be noted that the Government does not contend on this appeal that the amount of the attorneys' fee fixed by Judge Driver is too high. The Government's contention on this appeal is limited to the contention that no withdrawal whatever from the fund for payment of the District's attorneys could be made.

However, even, if the Government had been right instead of wrong in its contention that it was entitled to all of the net assets of the Priest Rapids Irrigation District—Judge Driver's order from which the Government appeals still would not be reversible on the Government's appeal. Even in that assumed situation, as regards the Government's contention that no allowance whatever for attorneys' fee was permissible, Judge Driver's order providing for withdrawal from the fund in federal court for payment of attorneys' fee would have been at least within "the sound discretion of the court, in view of all the circumstances." *Watson v.*

Johnson, 174 Wash. 12, 16, 24 P. 2d 592, 89 A.L.R. 1527.

In that case de facto directors of a savings and loan association *unsuccessfully* resisted the state director of efficiency in a proceeding brought by him for appointment of a receiver and for an involuntary liquidation of the association. The superior court allowed attorneys' fees and costs of the de facto directors, against the assets in the hands of the receiver. There were cross-appeals to the state supreme court. That court affirmed the principle of allowing attorneys' fees and costs against the assets in the hands of the receiver, and the court also increased the allowance for attorneys' fees. The court stated (174 Wash., at page 16):

"The principle upon which an allowance is made is that counsel fees and costs of the litigation are in the nature of expenses incurred by the corporation and its directors in the protection and preservation of the trust which they represent; and even if it turns out that a case is made for interference by the appointment of a receiver and the dissolution of the corporation, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and the fund involved in the litigation to the expenses incurred in discharging a general duty cast upon the corporation and its directors to take all reasonable means for its protection. *People v. Commercial Alliance Life Insurance Co.*, 148 N. Y. 563, 42 N. E. 1044; *Goodyear Tire & Rubber Co. v. United Motor*

Car & Supply Co., 89 N. J. Eq. 108, 103 Atl. 471; *Wolbrette v. New Orleans Drug Co.*, 149 La. 434, 89 South. 406; *Louque v. Hercules Oil Co.*, 170 La. 355, 127 South. 866.”

The Washington case of *Watson v. Johnson*, *supra*, has been followed in *Masterson v. Lennox Realty Co.*, 127 Conn. 35, 15 A. 2d 15, 16 and *Pickrel, Shaeffer & Eberling v. Merior*, 66 N. E. 2d 273, 276, 278 (Ohio). *Muellhaupt v. Joseph A. Strowbridge Estate Co.*, 140 Ore. 484, 14 P. 2d 282, is to the same effect.

The position of the de facto directors of the Priest Rapids Irrigation District and its attorneys is much stronger than the position of the de facto directors and attorneys involved in the Washington case of *Watson v. Johnson*, *supra*. In the condemnation proceeding, *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524, the District’s de facto directors and attorneys did more than defend against the United States “in good faith and upon reasonable grounds.” They did that, and they defended *successfully*. — The proof of that pudding is the judgment against the United States and in favor of the District, the \$422,252.80 paid into the district court in satisfaction of that judgment. — The cases cited by the Government (App. Br. 14) are not in point. More in point is this Court’s decision in *In Re Barceloux*, 74 F. 2d 289, 293, affirming the district court’s allowance of a \$25,000 attorney fee for services in recovering \$125,-

000 for a bankruptcy estate which otherwise had less than \$1000 of assets.

The Government states (App. Br. 12) that the District's de facto directors "were not obliged" to defend the condemnation action. — In view of the results obtained in that condemnation action, it is obvious that if the District's directors had not defended, the good faith and grounds of their decision not to defend would have been questionable.

Much of the Government's brief (App. Br. 2-11, 11-15) amounts to reargument of the Government's position in the condemnation action which this Court decided in *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524. If the Government were unhappy about being required to pay just compensation for the District's non-irrigation properties in accordance with the Schwellenbach formula, the Government could have sought review of this Court's decision by the Supreme Court of the United States. The Government did not do so. This Court's decision and the district court's modified judgment (R. 9-19) became final and conclusive.

Furthermore, the Government's contention regarding state law, which the Government urged upon this Court in the earlier appeal and which the Government reiterates in its argument on this appeal, was rejected on December 14, 1950 by the Washington supreme court. *United States v. Priest*

Rapids Irrigation District, 137 Wash. Dec. 583, 225 P. 2d 202.

The Government, if it so chooses, may go into the proper state court dissolution proceeding and claim some portions of the District's net assets, claiming to be transferee of those landowners who sold and conveyed their privately owned land to the Government. Whether a sale and conveyance of land within the District by a private land owner, after de facto dissolution of the District, transferred the land owner's interest in the District's non-irrigation properties is an open question in the Washington supreme court which expressly refrained from passing upon that question "even by inference." But as the state supreme court said, "The superior court may well be right in that portion of the judgment appealed from wherein it adjudged and decreed 'that the United States of America, plaintiff herein, has no interest whatever in the assets of the Priest Rapids Irrigation District' * * *." (137 Wash. Dec. 583, 588, 589, 225 P. 2d 202, 206)

The fund in the district court is there "*subject to the orders of this [United States District] Court*" until such time as that court pays the fund in to the state court for the use and benefit of the District in the state court dissolution proceeding.

The District's de facto directors and attorneys are "those whose efforts made possible the existence of the net assets which are available for distribution, despite the strenuous opposition of the United States." (137 Wash. Dec. 583, 588, 225 P. 2d 202, 205)

It was from that fund of \$422,252.80, the existence of which is due to the efforts of the District's directors and attorneys, that Judge Driver—with approval and consent of the District's directors—ordered a withdrawal for the purpose of compensating those legal services.

A withdrawal from that fund for that purpose obviously was proper.

The Government's appeal is without merit.

CROSS-APPELLANTS' ARGUMENT ON CROSS-APPEAL

I

Withdrawal from the fund and payment of attorneys' fee should have been ordered in accordance with the contingent fee contract, as approved and consented to by the District.

The contingent fee contract (R. 76-78) having been made in the State of Washington, the validity of the contract and the rights of the contracting attorneys are to be determined under the contract law of Washington. *Spellman v. Bankers' Trust Co.*, 2 Cir., 6 F. 2d 799, 800. The power and au-

thority of the Priest Rapids Irrigation District to enter into the contingent fee contract is a matter of state law; and pertinent state decisions are authoritative. *Alameda County v. United States*, 9 Cir., 124 F. 2d 611, 616, 617.

Contingent fee contracts, such as that between the District and its attorneys, are valid in the State of Washington. *Hardman v. Brown*, 153 Wash. 85, 87, 92, 279 Pac. 91, recognized a 50% contingent fee contract as permissible under the laws of Washington; and in that case the contingent fee amounted to about \$62,500, the value of the property recovered apparently being approximately \$125,000. — The contingent fee contract involved in this appeal (R. 76-78) calls for a fee of \$78,918.85 from the \$422,252.80 paid in satisfaction of the judgment in favor of the District. That fee amounts to about 19% of the fund in court, first reduced by the District's expenses in the litigation. The computation of the fee and its payment from the fund in court were approved and consented to by resolution of the District's board of directors (R. 79-80).

Earlier Washington cases have upheld contingent fee contracts. *Beck v. Boucher*, 114 Wash. 574, 195 Pac. 996; *Albert v. Munter*, 136 Wash. 164, 176, 239 Pac. 210.

Municipal corporations of the State of Washington have power and authority to make contingent

fee contracts. In *Reed v. Gormley*, 47 Wash. 355, 91 Pac. 1093, the court upheld the authority of the county commissioners of King County to employ counsel to prosecute suits to secure escheats, the compensation to be 50% of the value of the estates counsel procured to be escheated. In *State ex rel. Hunt v. Okanogan County*, 153 Wash. 399, 423, 280 Pac. 31, the court upheld a 50% contingent fee contract made by Okanogan County with Hunt for services in support of the county's equitable and moral claim against the United States. Satisfaction of the claim in the sum of \$77,435.31 was obtained; and the state supreme court directed that the county be compelled to pay Hunt his fee of \$38,717.65. The court's opinion, regarding the contingent fee contract with the municipal corporation of Okanogan County, stated (153 Wash., at p. 423):

"We are of the opinion that the employment of relator and his predecessor by the county commissioners was within their statutory powers. We do not concern ourselves in this case with the question of the wisdom of the making of the employment contract here in question. Indeed, we are not asked by counsel on either side to do so. We are only deciding that the commissioners had the power to make the contract, and that, it being faithfully and effectually performed and the county having reaped the benefit thereof, relator is entitled to compensation according to the terms of the contract."

In deciding to disregard the “19%” contingent fee contract between the District and its attorneys, Judge Driver stated (R. 313):

“If I had before me a contingent contract of this kind between a live and functioning municipal corporation and attorneys on some claim that the District had, I would not hesitate to say that this is a fair and reasonable contract. I think it is, but under the circumstances of this case, where the District had gone out of business, where the funds are being brought in as trust funds for the benefit of beneficiaries and the beneficiaries may very well be the government in this case, I think that the court should be somewhat conservative, perhaps, if I may put it that way, in the matter of the allowance of fees, and I think that even in these times of inflation \$50,000 is a good fee in a lawsuit.”

It is submitted that Judge Driver erred in so deciding. The reasons which support and justify contingent fee contracts are greater in the case of a municipal corporation which has been put out of business and which has practically no funds except such as may be recovered in litigation—than in the case of a “live and functioning municipal corporation” which generally could engage attorneys upon the basis of certain rather than contingent compensation. In fact, in the case of a municipal corporation which has been put out of business and which has practically no funds except such as may be recovered in litigation, the reasons which support and justify contingent fee contracts are compelling.

The power and authority of a municipal corporation, in the situation of the Priest Rapids Irrigation District, to make a binding contingent fee contract should not be whittled down in view of the situation. The pertinent statute law and court decisions of the State of Washington do not lend support to a whittling down of such power and authority. Instead, they lend support to a strengthening of that power and authority.

Remington's Revised Statutes, Section 7428, regarding an irrigation district's board of directors, provides that:

"The board shall have the power, and it shall be its duty, * * * to make and execute all necessary contracts, * * * and generally to perform all such acts as shall be necessary to fully carry out the provisions of this chapter, * * *."

Remington's Revised Statutes, Section 7431, authorizes and empowers the board of directors:

"to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this chapter, or to enforce, maintain, protect, or preserve any and all rights, privileges, and immunities created by this chapter, or acquired in pursuance thereof; and in all courts, actions, suits, or proceedings, the said board may sue, appeal, and defend, in person or by attorney, and in the name of such irrigation district."

In cause No. 8035 in the superior court for Benton County, the court on August 1, 1946 decreed (R.

104-107) that B. Salvini and J. H. Evett are de-facto directors of the District, and the court's decree provided (R. 106) that until further order or decree of that court, as provided for later in the decree, B. Salvini and J. H. Evett:

“shall continue to function as directors of said district and in particular shall do any and all things necessary to the defense by said district against the petitioner in the condemnation action of United States of America v. Alberts, et al., Civil No. 128 in the United States District Court for the Eastern District of Washington, and necessary to protect otherwise the interests of said district.”

Regarding the August 1, 1946 order or decree in the state court cause No. 8035, the December 14, 1950 opinion of the Washington supreme court states:

“It was necessary that someone represent the district in that [condemnation] proceeding, and, on a proper showing, the superior court for Benton County, in an action commenced by a former landowner and the last elected directors of the district, which action is hereinafter referred to as cause No. 8035, made and entered an order August 1, 1946, appointing the last elected directors, B. Salvini and J. H. Evett, to function as such directors and to ‘do any and all things necessary to the defense by said district’ in the condemnation proceeding.” (137 Wash. Dec. 583, 585, 225 P. 2d 202, 204)

In view of the pertinent irrigation laws of Washington quoted above (page 41, *supra*) and in view of the August 1, 1946 decree in the state court

proceeding—it is clear that the District's de facto directors had more definite power and authority to make the contingent fee contract with the District's attorneys, than the power and authority of the county commissioners involved in *Reed v. Gormley*, 47 Wash. 355, 91 Pac. 1093, and *State ex rel. Hunt v. Okanogan County*, 153 Wash. 399, 280 Pac. 31. — Beyond question the authority of the District's directors to make the contingent fee contract with the District's attorneys was within the object, spirit and meaning of the Washington statutes regarding irrigation districts. And the controlling canon of statutory construction is as stated (and applied) in *State ex rel. Thorp v. Devin*, 26 Wn. 2d 333, 345, 173 P. 2d 994:

“A thing which is within the object, spirit, and meaning of a legislative act is as much within the act as if it were within the letter.”

Furthermore, as the supreme court of the State said in *Beasley v. Assets Conservation Co.*, 131 Wash. 439, 443, 230 Pac. 411, in upholding the validity of a contract under which warrants were issued by an irrigation district:

“Its (district's) powers are not only such as are granted in express words, but also those necessarily or fairly implied in or incident thereto or indispensable to its declared objects and purposes.”

Moreover, the court allows irrigation districts' boards of directors to exercise wide latitude of dis-

cretionary judgment. In *Hanson v. Kittitas Reclamation District*, 75 Wash. 297, 313, 134 Pac. 1083, the court stated:

“The board of directors are clothed by the statute with a wide discretion as to the manner in which they shall manage the business of the district, and the courts are not warranted in interfering on any mere question of good business policy. Nothing short of a gross abuse of their powers will warrant such an interference.”

At the hearing before Judge Driver on January 5 and 6, 1950 Government counsel dwelt on an earlier, 1943, contract between the District and Moulton & Powell. Regarding that contract (R. 97-99) a number of pertinent and related exhibits were introduced and testimony was adduced (R. 81-122; R. 130-228). — It is clear from the evidence that the 1943 contract covered only the services rendered by Moulton & Powell to the District through October 1943 in connection with presentation of problems, involving the District owned properties, in a few selected “test” cases covering condemnation of privately owned lands within the District.

In any event, the 1943 contract was superseded by the contingent fee contract which expressly provides (R. 78): “This contract shall supersede the contract heretofore made between the District and

Moulton & Powell.” — In the course of Government counsel’s argument before Judge Driver (R. 267-291; R. 306-309) some contention was made that the contingent fee contract is not supported by any consideration additional to that involved in the 1943 contract. That contention is irrelevant, since the services covered by the contingent fee contract were additional to those contemplated and compensated by the 1943 contract. However, it should be noted that no express or independent consideration would have been necessary under the law of the State of Washington.

In *Long v. Pierce County*, 22 Wash. 330, 344, 348, 61 Pac. 142, the state supreme court reversed the trial court which had rejected an offer of oral evidence that county commissioners had orally modified a construction contract providing, by the modification, more favorable terms to the contractor. Regarding one of the contentions made by appellee, the court stated (22 Wash., at p. 348):

“It is further insisted that the proffered testimony was properly rejected for the reason that no offer was made to show a consideration for the modification of the original agreement, or reciprocal advantage accruing to the county by reason thereof, and that the record contains nothing upon which a consideration can be inferred. *But no express or independent consideration was necessary.* ‘The contract, when modified by subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract.’ ” (Italics added)

The Pierce County case, *supra*, was followed in *Stofferan v. Depew*, 79 Wash. 170, 172, 139 Pac. 1084, in which the court affirmed a judgment for plaintiff based upon a second agreement of the parties. In upholding the second agreement, the court stated (79 Wash., at p. 172):

“Appellant first contends that the second agreement executed subsequent to the sale is void for want of consideration. It is apparent from the terms of the two agreements and the allegation of the complaint that the second agreement, as a mutual act of the parties, was made as an amendment to, or in substitution for the original. The substitution of a new contract for an old one, in itself constitutes a sufficient consideration.”

Those cases are the law of the State of Washington, and it should be noted that the leading case of *Long v. Pierce County*, *supra*, involved a municipal corporation. — The contingent fee contract (R. 76, 78) provides that: “This contract shall supersede the contract heretofore made between the district and Moulton & Powell.”

The contingent fee contract was a very reasonable arrangement; it could have provided for larger percentages of compensation and still have been reasonable. That was the opinion of three eminent members of the bar who testified, or whose testimony at the district court’s suggestion was stipulated (R. 123-128). Those witnesses were V. O.

Nicholson, president of the Washington State Bar Association and formerly, for eight years, a superior court judge in Yakima County (R. 128); John Gavin, member of the Board of Governors of the Washington State Bar Association and past president of the Yakima County Bar Association (R. 128, 264); and Harold Shefelman, formerly a member of the House of Delegates of the American Bar Association, formerly president of the Seattle Bar Association, and an attorney of wide experience in representing municipal corporations (R. 123, 124).

Judge Driver stated that he thought the contingent fee contract (for about 19% of the \$422,252.80) would be “a fair and reasonable contract” if made by a “live and functioning municipal corporation” (R. 313); and he stated: “In the absence of those [the Government’s] objections I should be inclined to grant the petition, of course.” (R. 267)

The Government’s only objections before this Court (App. Br. 11-16)—that the district court was without jurisdiction, and that no withdrawal whatever could be made from the fund for compensating the District’s attorneys—are without merit (pages 13-37, *supra*). Furthermore, the Government’s basic contention, upon which the Government bases its appellate objection to any withdrawal whatever, was rejected by the Washington Su-

preme Court on December 14, 1950. *United States v. Priest Rapids Irrigation District*, 137 Wash. Dec. 583, 225 P. 2d 202.

A contingent fee contract is more essential to a municipal corporation in the situation of the District, and more justifiable, than in the case of a "live and functioning municipal corporation."

The District's board of directors approved and consented to payment, from the \$422,252.80 fund, of the contingent contract fee of \$78,918.85—about 19% of the fund (R. 79-80).

The petition for payment of the contingent contract fee—approved and consented to by the District—should have been granted.

II

Alternatively, the district court should have allowed \$78,918.85 as attorneys' fee, upon the basis of reasonable value of services, without regard to any contract, but giving consideration to the necessarily contingent character of compensation.

Cross appellants are fully aware of the many court decisions which hold that a federal appellate court generally will not disturb an allowance for attorneys' fee fixed by the district court in the exercise of its sound discretion.

However, the recent decision of the Washington supreme court in *United States of America v. Priest Rapids Irrigation District*, 137 Wash. Dec. 583, 225

P. 2d 202, on December 14, 1950 provides in this cross-appeal a special and persuasive reason for this Court reviewing Judge Driver's order of March 10, 1950 (R. 32-33).

Furthermore, the novel, unique and complex aspects of the condemnation case, *United States v. Priest Rapids Irr. Dist.*, 9 Cir., 175 F. 2d 524, are within the knowledge of this Court.

And, "appellate courts, as trial courts, are themselves experts as to the reasonableness of fees, and may, in the interest of justice, fix the fees of counsel, albeit in disagreement on the evidence with the views of the trial court." *Mercantile-Commerce B. & T. Co. v. S. E. Arkansas L. District*, 8 Cir., 106 F. 2d 966, 973.

In evidence (R. 317-319) are the opinions of three eminent members of the bar, V. O. Nichoson, John Gavin and Harold Shefelman (see page 47, *supra*). After their opinions on the reasonableness of the contingent contract were given (R. 123-128), and after the district court announced the theory it adopted (R. 310-313), their opinions were given as to the reasonable value of the services under the theory that the court adopted (R. 317-319).

V. O. Nichoson and John Gavin were of the opinion that "without regard to any contract, but giving consideration to the necessarily contingent character of compensation for the services, the reasonable value of the services rendered in this con-

demnation case by petitioning attorneys is approximately \$80,000.” (R. 318). Upon the same basis, Harold Shefelman was of the opinion that the reasonable value of the services is in excess of \$80,000. (R. 318-319).

At the January 5-6, 1950 hearing in Yakima, as a rebuttal witness, John Gavin testified regarding contingent fee contracts in Yakima County (R. 264-266). The Yakima County Bar Association’s printed fee schedule provides for a contingent fee of 33-1/3 per cent of the recovery in trial court litigation; and that provision applies to all litigation handled upon a basis of contingent compensation (R. 264-265). In the event of appeal of a case tried upon a contingent fee basis, the custom in the Yakima County bar is to increase the 33-1/3% to 40%.

The \$78,918.85 fee which cross-appellants seek is about 19% of the \$422,252.80 fund, first deducting from the fund the District’s expenses (R. 79-80). — Even if the contingent fee contract made by the District and its attorneys is not given contractual effect, nevertheless that contract (R. 76-78) and the District board’s resolution of November 19, 1949 (R. 79-80) are evidence that the District’s directors consider \$78,918.85 to be the reasonable value of the services.

In ruling on the matter on January 6, 1950, Judge Driver stated (R. 312):

“I need hardly say that the litigation is unusually difficult, involved questions that were not only novel, but perhaps unique, and that the case was very capably conducted and successfully prosecuted both in the trial court and the appellate court.”

Because of the novel and perhaps unique aspects of the condemnation case in which cross-appellants rendered their services, reference to decide cases involving allowance of attorney fees is not particularly helpful in this cross-appeal. However, several of the decided cases have some bearing on this cross-appeal.

In the case of *In re Levinson*, D. C., W. D. Wash., 19 F. 2d 253, 256, attorney fees in the sum of \$42,500 were allowed, approximately 25% of the amount recovered. Judge Neterer stated (19 F. 2d, at p. 256):

“This is a very unusual case. At the inception of this estate there was no fund for the payment of the attorneys. The fees for their services necessarily were contingent, * * * and should be fairly compensated.”

In the case of *In re Barceloux*, 9 Cir., 74 F. 2d 288, 293, attorneys for the trustee in bankruptcy recovered \$125,000 for the estate which otherwise had less than \$1000 of assets. The attorneys were allowed \$25,000 in fees, 20% of the recovery. This Court stated in its opinion (74 F. 2d, at page 293):

“In the instant case, there was no contract for a contingent fee or for any fee. The attorneys

for the trustee petitioned for the reasonable value of services rendered. In such a case the fees allowed, to be reasonable, must take into consideration that the attorneys rendered services, compensation for which was inherently contingent, for, unless a recovery were had, there would be no funds in the estate from which remuneration could be made for the effort put forth.”

In *United States v. Anglin & Stevenson*, 10 Cir., 145 F. 2d 622, cert. den. 324 U. S. 844, the court affirmed the allowance of a 25% fee from the \$1,235,724.72 estate of the Indian, Jackson Barnett. The allowance by the district court and the affirmation by the appellate court were strenuously opposed by the United States, the Secretary of the Interior being guardian of the trust funds inherited by the successful heirs.

In view of the necessarily contingent character of compensation for cross-appellants' services, and in view of their successful handling of the unusual condemnation case which involved novel and unique questions, an allowance of \$78,918.85 as the reasonable value of cross-appellants' services should have been made by the district court. That attorneys' fee, about 19% of the \$422,252.80 fund, is particularly justifiable in view of the Washington supreme court's decision in *United States v. Priest Rapids Irrigation District*, 137 Wash. Dec. 583, 225 P. 2d 202. That decision of December 14, 1950 rejects the Government's basic contention; and it was consideration of that contention which led Judge

Driver in January 1950 to be “somewhat conservative” (R. 313) in determining the reasonable value of services.

CONCLUSION

For the foregoing reasons the Government’s appeal should be held to be without merit. And on the cross-appeal, upon the basis of the contingent fee contract or upon the basis of reasonable value of services, the order appealed from should be reversed with direction that the district court enter an order allowing cross-appellants an attorney fee of \$78,918.85 from the \$422,252.80 fund in the district court.

Respectfully submitted,

MOULTON & POWELL

Kennewick, Washington

and

J. K. CHEADLE

Spokane, Washington

January 1951

APPENDIX A

[137 Wash. Dec. 583, 225 P. 2d 202]
 [No. 31547. *En Banc*. December 14, 1950.]

In the Matter of the Dissolution of PRIEST RAPIDS
 IRRIGATION DISTRICT.

THE UNITED STATES OF AMERICA, *Appellant*, v.
 PRIEST RAPIDS IRRIGATION DISTRICT *et al.*, *Respondents*.¹

[1] United States—Eminent Domain—War—Compensation for Property Taken Under War Powers—Distribution of Assets of Irrigation District.

Appeal from a judgment of the superior court for Benton county, MacIver, J., entered May 2, 1950, dismissing an action for the dissolution and distribution of the assets of an irrigation district. Affirmed.

Bernard H. Ramsey and Hart Snyder (A. Devitt Vanech and John F. Cotter of counsel), for appellant.

Moulton, Powell & Gess and J. K. Cheadle, for respondents.

The Attorney General and E. P. Donnelly, Assistant, amicus curiae.

HILL, J.—The question before us is whether the United States, having by condemnation, and by purchase subsequent to the commencement of condemnation proceedings, acquired all the lands within the Priest Rapids Irrigation District, hereinafter called the district, is entitled to the net assets of the district, when those assets consist of moneys paid the district for its non-irrigation properties.

The district owned and operated a pumping plant, canals and other irrigation properties, together with a power plant and transmission lines used in part for the generation and transmission of power for the pumping of water for irrigation purposes and

in part for the generation and transmission of additional power for commercial purposes.

February 23, 1943, the United States commenced an action under the second war powers act to condemn about 194,000 acres (for the Hanford atomic engineering project) by perimeter description, including all of the lands within the district (15,950.39 acres). On the same date, the United States obtained an order granting to it the right to immediate possession of all the property described, for military purposes. April 1, 1943, the United States took actual physical possession of the district's pumping plant, main canal and related irrigation properties, which made it impossible for the district to continue to provide irrigation water service for the lands within its boundaries, the purpose for which it had been organized and operated. October 1, 1943, the United States took actual possession of the power properties of the district.

It is these power properties that are responsible for the present litigation. As the condemnation proceedings came on to trial for the purpose of determining the amounts which the various landowners within the district were entitled to receive as compensation for their property, their interest in the valuable and profitable commercial power-producing properties of the district became a subject of controversy. To eliminate the necessity of proving, in each individual condemnation case, the value of those properties and the condemnee's proportionate share therein, with the probability of varying values being fixed by different juries, the able and distinguished judge of the United States district court before whom the cases were tried, the late Lewis Baxter Schwollenbach, devised what is referred to throughout the litigation as the "Schwollenbach formula" for the solution of the unusual and difficult problem presented. The formula involved an allocation of the value of the properties of the dis-

strict between those used for irrigation and those used for non-irrigation (commercial power) purposes.

It was Judge Schwellenbach's position (affirmed by the ninth circuit court of appeals, *United States v. Priest Rapids Irr. Dist.*, 175 F. (2d) 524) that, when the United States acquired and paid for all the lands within the district, it also acquired and paid for all the irrigation properties of the district (they of necessity being considered in determining the value of the land), but that it did not pay for the non-irrigation (commercial power) properties belonging to the district. Speaking of the non-irrigation assets, Judge Schwellenbach said:

“ ‘The fact is that, in the first case which was tried, the landowner attempted to assert his claim to his proportionate share in the District's assets, the petitioner [Government] objected and I ruled against the landowner. The basis of this ruling was that in the trial for the purpose of determining the compensation to be paid for a separate tract, there was no room to try out also the value of that landowner's proportionate share of the District assets. He was not the owner of the legal title to the District assets. He had no right to assert a direct claim to his proportionate share. Furthermore, as a matter of procedure, if I had permitted each landowner to assert his claim in each separate trial, it would have resulted in chaos and interminable delay as a consequence of which this [these] cases never would have been completed . . . it would have resulted in an absurd situation because the landowner in one case would have a jury fixing one value upon the District's assets and then the jury in the next case might place an entirely different value upon the District's assets. The awkwardness and the confusion which would have resulted was realized by counsel on both sides and dozens of cases have been tried since with the understand-

ing that, at some time, the question of the right of the landowners to their proportionate share of the value of the District assets would be thrashed out.' ” (As quoted in *United States v. Priest Rapids Irr. Dist.*, *supra.*)

At Judge Schwellenbach's insistence, the United States instituted a proceeding to determine the amount it should pay for the non-irrigation (commercial power) properties of the district. It was necessary that someone represent the district in that proceeding, and, on a proper showing, the superior court for Benton county, in an action commenced by a former landowner and the last elected directors of the district, which action is hereinafter referred to as cause No. 8035, made and entered an order August 1, 1946, appointing the last elected directors, B. Salvini and J. H. Evett, to function as such directors and to “do any and all things necessary to the defense by said district” in the condemnation proceeding. The *de facto* directors, through their counsel, made an effective presentation of the district's case, with the result that the United States was required to pay \$473,356 for the non-irrigation (commercial power) properties. After payment of the bonded indebtedness of the district, there remained \$302,856, together with interest, for distribution on the dissolution of the district. It must be remembered, when reference is made herein to the net assets of the district available for distribution, that there are no assets available for distribution except this portion of the amount paid for the non-irrigation (commercial power) properties.

The distinction between the irrigation and non-irrigation properties of the district having been established by Judge Schwellenbach and affirmed in *United States v. Priest Rapids Irr. Dist.*, *supra.*, two basic problems were left for solution by the courts of this state: (1) How was the district to

be dissolved or disorganized? and (2) Who was entitled to share in the net assets of the district?

The United States, conceiving that as owner of all the land in the district it was entitled to the entire amount available for distribution, filed an action in the Benton county superior court November 15, 1949, which action is hereinafter referred to as cause No. 9913, alleging that the statutes of the state of Washington make no provision for the dissolution of an irrigation district under the circumstances existing in this case, and that the United States would sustain a substantial pecuniary loss and irreparable damage if the district was not dissolved. It invoked the equity power of the court to appoint a receiver for the purpose of dissolving the district, paying all lawful claims, and distributing the net assets to the United States.

Thereafter, November 25, 1949, in cause No. 8035, a petition was filed by Salvini and Evett, the *de facto* directors who had maintained and established the right of the district to the award for its non-irrigation (commercial power) properties, alleging that the statutory proceedings for the dissolution of irrigation districts were not applicable to the present situation; and asking that the court decree that said district was in effect or *de facto* dissolved on or about February 23, 1943, and not later than April 1, 1943, and that the court administer the trust estate of the district and distribute it to the persons equitably entitled to share in it; and asking, further, that Salvini, Evett and R. S. Reiersen be appointed as liquidating trustees, and that the court adjudge that those entitled to share in the assets of the district available for distribution are those persons who, by reason of their interest in lands located within the boundaries of the irrigation district, were members of the group which was really interested in the success of the district and had to meet the burden of said district prior to the

disruptive action taken by the United States in pursuance of its war powers.

The superior court for Benton county entered an order fixing December 12, 1949, as the date of the hearing on the petition, and directing that notice be published and be served upon the United States and the state of Washington. The date of hearing was thereafter continued to February 20, 1950.

By agreement, cause No. 9913 and cause No. 8035 came on simultaneously for hearing before the superior court for Benton county, February 20, 1950.

All litigants were agreed that none of the four statutory methods for the dissolution of irrigation districts (Rem. Rev. Stat., §§ 7526 to 7530, 7531 to 7543, 7543-1 to 7543-33 [P.P.C. §§ 679-421 to -525]; Rem. Rev. Stat. (Sup.) §§ 7527-1 to 7527-3 [P.P.C. §§ 679-431 to -435]) were applicable to the existing circumstances.

All litigants asked that the Benton county superior court proceed under its inherent equity power to dissolve the district and distribute its net assets to those entitled to receive them. They were in marked disagreement as to who should control the liquidation (under the direction of the court) and as to who should receive the net assets.

The trial court's order in cause No. 9913 reads in part:

“NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, plaintiff [appellant] herein, has no interest whatever in the assets of the Priest Rapids Irrigation District and has no basis for seeking distribution to the United States of the net assets of the District or for seeking the ancillary or incidental relief of appointment of a receiver; and accord-

ingly, the plaintiff's complaint and petition for dissolution be and it hereby is dismissed with prejudice."

The United States appeals from that order.

Actually, the issue presented by the order appealed from is very narrow: Is the United States entitled to the net assets of the district on its dissolution? If so, there is merit in the government's contention that it should, in effect, control the liquidation and have the right to keep expenses at a minimum; if not, it has no right to control the liquidation, and there is no basis for its attempt to take the liquidation out of the hands of those whose efforts made possible the existence of the net assets which are available for distribution, despite the strenuous opposition of the United States.

[1] We have no hesitancy in determining that issue contrary to the contention of the United States. We base our holding that the United States has no exclusive right to the net assets of the district on three propositions:

(1) When the United States, in the exercise of its war powers, made it impossible for the district to carry out the purposes for which it had been organized, the district was dissolved *de facto* as of that date (probably February 23, 1943; certainly not later than April 1, 1943).

(2) The owners of the lands within the district at the time of the *de facto* dissolution (at least the owners of lands on which all assessments had been paid) had, as a result of that ownership, an interest in the non-irrigation (commercial power) properties of the district.

(3) The United did not acquire that interest in the non-irrigation properties from any landowner whose property it acquired solely through the condemnation procedure, as the extent and value

of that interest was expressly excluded from the consideration of the jury when determining what such landowners were to be paid.

Not having acquired the interest in the non-irrigation properties of those landowners in the district whose property it acquired solely through the condemnation procedure, the United States did not have an exclusive right to the net assets of the district on its dissolution, and it had no basis for complaint when the superior court for Benton county dismissed cause No. 9913 and elected to proceed to dissolve the district and distribute its net assets in cause No. 8035.

Nothing further is needed to justify an affirmance of the judgment of dismissal in cause No. 9913.

We do not pass upon the question, even by inference, as to whether, when an owner of land in the district acquired an interest in its non-irrigation properties on the *de facto* dissolution of the district, and thereafter sold and conveyed his land to the United States, he thereby transferred his interest in the non-irrigation properties to the United States. If both such former owner and the United States come into court claiming a portion of the net assets on the basis of that interest, the court would, in the dissolution proceeding, determine whether the owner had transferred that interest to the United States or had retained it.

The superior court may well be right in that portion of the judgment appealed from wherein it adjudged and decreed "that the United States of America, plaintiff herein, has no interest whatever in the assets of the Priest Rapids Irrigation District," but it seems to us that the court went beyond the determination of the issue properly before it at the time the order of dismissal was entered, that issued being whether the United States was entitled to *all* the net assets of the district available

for distribution. The portion of the judgment of the superior court quoted on p. 587 hereof will be modified to read:

“NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, plaintiff herein, has no *exclusive* interest . . . in the assets of the Priest Rapids Irrigation District and has no basis for seeking distribution to the United States of *all* the net assets of the District or for seeking the ancillary or incidental relief of appointment of a receiver; and accordingly, the plaintiff's complaint and petition for dissolution be and it hereby is dismissed with prejudice.” (Additions indicated by italics, deletion by series of periods.)

As modified, the judgment of dismissal of cause No. 9913 is affirmed. Respondents will recover their costs on this appeal.

BEALS, ROBINSON, MALLERY, SCHWELLENBACH, GRADY, HAMLEY, and DONWORTH, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

In and for Benton County

In the Matter of the Dissolution of
PRIEST RAPIDS IRRIGATION DISTRICT, a Corporation,
UNITED STATES OF AMERICA,
Plaintiff,

vs.

PRIEST RAPIDS IRRIGATION DISTRICT,
a Corporation, and
B. SALVINI, J. H. EVETT and R. S.
REIERSON,

Defendants.
No. 9913

DECREE AND ORDER OF DISMISSAL

The above entitled cause, in due and regular course and at the request of plaintiff, having come on for trial on the merits on February 20, 1950 before the Honorable Ian MacIver, Judge of the above entitled Court, the plaintiff appearing and being represented by Hart Snyder, Special Attorney, Department of Justice, and the defendant appearing and being represented by their attorneys, Charles L. Powell and J. K. Cheadle; documentary evidence and testimony having been adduced by plaintiff and by defendants on February 20, 1950; the hearing having been continued for introduction of further evidence and for argument until March 13, 1950; the parties prior to March 13, 1950 having submitted to the Court written briefs and memoranda; further evidence having been introduced on March 13, 1950 and arguments of counsel having been heard on March 13 and 14, 1950; and the Court being fully advised; and the matter of the form of this decree and order having duly come on for hearing on April 22, 1950 in Yakima, Washington by stipulated consent of the parties; and

It appearing to the Court that the Priest Rapids Irrigation District is an irrigation district which was organized and operated under the laws of the State of Washington; and that said district on February 23, 1943 owned and operated a pumping plant, canals and other irrigation properties together with a power plant and transmission line used in part for the generation and transmission of power for the pumping of water for irrigation purposes and in part for the generation and transmission of excess power for commercial purposes; and

It further appearing that on February 23, 1943 the plaintiff, the United States of America (hereinafter referred to as the "Government"), pursu-

ant to the Act of Congress approved August 18, 1890, (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918, (40 Stat. 518; 50 U.S.C. Sec. 171) and March 27, 1942, (Public Law 507—77th Congress), known as the Second War Powers Act, 1942, and the Act of Congress approved July 2, 1942. (Public Law 649—77th Congress) commenced, in the United States District Court for the Eastern District of Washington, a condemnation action entitled United States of America, petitioner vs. Clements P. Alberts, et al., defendants, No. 128, an action to condemn an area including about 194,000 acres, which area, described by perimeter description, included all of the lands within the Priest Rapids Irrigation District and also more than 150,000 acres of additional land, the condemnation being for military purposes, for establishment of the Hanford Engineering (Atomic Energy) Project; and it appearing that in said condemnation action on the same date, February 23, 1943, the Government obtained an order granting to the Government, pursuant to the applicable acts of Congress above set forth, the right of immediate possession to said area of approximately 194,000 acres; and it appearing that on April 1, 1943 the Government, pursuant to said order granting it the right of immediate possession for military purposes, took actual, physical possession of the Priest Rapids Irrigation District's pumping plant, main canal and related irrigation properties, and that said taking by the Government made it impossible for the Priest Rapids Irrigation District to continue to provide irrigation water service for the lands within its boundaries, the purpose for which it had been organized and operated; and

It further appearing that on April 22, 1943 there were filed and entered in said condemnation action an amended petition and an amended order granting the right of immediate possession, increasing

the area covered by the condemnation action of about 206,000 acres; and it appearing that pursuant to said orders of February 23, 1943 and April 22, 1943, granting to the Government the right of immediate possession for military purposes, the Government on October 1, 1943 took actual, physical possession of the power properties of the Priest Rapids Irrigation District (hereinafter referred to as the "District"); and

It further appearing that between February 23, 1943 and May 12, 1944 the Government for said military purposes took actual possession of all tracts of land within the boundaries of the District and acquired title to said tracts of land by the filing of declarations of taking in said condemnation action and by deeds with consequent dismissals in said condemnation action, and that compensation for the taking of said tracts was determined by agreement between the parties as evidenced by options and acceptances thereof or by stipulations and by jury verdicts; and

It further appearing that in said condemnation action in a proceeding regarding the properties of the District, the Federal District Court entered a judgment on verdict against the Government and in favor of the District in the sum of \$473,356, together with interest, as just compensation for the taking by the Government of the so-called non-irrigation (power) properties of the District used for commercial purposes; and that said Federal District Court refused to allow a condemnation award to the District for the value of the so-called irrigation properties of the District, said award for the non-irrigation properties and refusal of an award for the irrigation properties being in accord with the so-called Schwellenbach formula established by District Judge Schwellenbach prior to the jury trial; and it appearing that District Judge Driver (who succeeded Judge Schwellenbach dur-

ing the course of the proceeding in the trial court) in entering judgment on verdict declined to credit against the jury verdict of \$473,356 the \$170,500 which had been deposited in court by the Government as the estimated just compensation for all of the properties of the District taken by the Government and which \$170,500 had been used, pursuant to stipulations of the parties and orders of the Court, to discharge the bonded indebtedness of the District, and that District Judge Driver instead charged said \$170,500 against the irrigation properties of the District for which no condemnation award had been allowed but which irrigation properties, in response to a special interrogatory, the jury had valued at \$365,845; and

It further appearing that upon appeal and cross appeal to the United States Court of Appeals for the Ninth Circuit, said appellate court concluded that the judgment should have provided that the \$170,500 should be applied as a credit against the condemnation award of \$473,356; and it appearing that said appellate court accordingly decided that judgment against the Government for \$302,856 should have been entered; and

It further appearing that said Federal appellate court was of the opinion that the Federal District Court did not err by directing in its judgment that the amount of the award should be paid into the Federal District Court there to remain subject to the orders of that Court until such time as said Federal District Court should order payment of the same to the Superior Court of the State of Washington for Benton County, for the use and benefit of the District in liquidation proceedings to be maintained in said Superior Court, the disposition of the fund to be finally decided by this State court under applicable state law in the proceedings pending in this State court; and

It further appearing that in accordance with the disposition of the case by the United States Court of Appeals, the Federal District Court on November 21, 1949, signed and entered a modified and final judgment on verdict which provided that:

“It Is Further Ordered, Adjudged and Decreed that the only person having an interest in and to the compensation above fixed is the Priest Rapids Irrigation District, a public corporation, and that there be and hereby is entered against the petitioner, the United States of America, and in favor of the defendant Priest Rapids Irrigation District, a judgment for the difference between \$473,356.00 and \$170,500.00, which judgment shall bear interest at the rate of 6% per annum on \$473,356.00 from October 1, 1943 until May 12, 1944, and at the rate of 6% per annum on \$302,856.00 from May 12, 1944, until paid, and

“It Is Further Ordered, Adjudged and Decreed that said deficiency judgment of \$302,856.00, together with interest as above ordered, and the whole thereof, shall be paid into this Court and remain subject to the orders of this Court until such time as this Court shall order the payment of the balance of the same to the Superior Court of the State of Washington, in and for Benton County, for the use and benefit of the Priest Rapids Irrigation District in liquidation proceedings to be maintained in said Superior Court, and

“It Is Further Ordered, Adjudged and Decreed that title to the hereinabove described interests in the above described properties be and the same is hereby vested in the United States of America, petitioner herein, as to the irrigation properties as of April 1, 1943, and as to the power properties as of October 1, 1943, which said title is free and clear of any

and all charges, interests, claims, taxes, liens and encumbrances of any kind or character whatsoever.”

and

It further appearing that said judgment, together with interest, in the total amount of \$422,252.80, in favor of the Priest Rapids Irrigation District, was paid into the registry of said Federal District Court by the Government on or about December 23, 1949; and it appearing that said Federal District Court has ordered a withdrawal from said sum for payment of certain certificates of indebtedness of the District, that said Federal District Court has ordered a withdrawal from said sum for payment of attorneys’ fee to the attorneys of the District, regarding which order re attorneys’ fee the Government has obtained a stay and is taking an appeal to the United States Court of Appeals for the Ninth Circuit, and that the balance of said sum remains in said Federal District Court under said modified and final judgment; and

It further appearing that the assets of the District are comprised almost entirely of the aforementioned sum in said Federal District Court, that the District has no bonded indebtedness, and that the District is not insolvent; and

It further appearing from the files and records of this Court in Wright, et al. v. Chapman, et al., No. 8035 in the above entitled Court, which files and records are in evidence in this cause No. 9913, that pursuant to an order of this Court, dated August 1, 1946, in said cause No. 8035 B. Salvini and J. H. Evett, plaintiffs in said No. 8035, on November 23, 1949, filed in said pending cause No. 8035 their petition re further proceedings; and that, although the Government had knowledge of, and an opportunity to appear and be heard at, the hearing on said petition re further proceedings in said No. 8035 as shown by the records and files

therein, the Government has not made any appearance in said cause No. 8035; and

It further appearing that in this cause No. 9913 the Government requested that this cause No. 9913 be set for trial on the merits on February 20, 1950, the same date which had previously been set for hearing on the petition re further proceedings in said cause No. 8035; and the said two causes having come on for hearing before this Court on the same date and, upon motion by defendants in No. 9913, this Court having consolidated the two causes for strictly limited purposes of a single hearing, by an order expressly providing that the order of consolidation and the single hearing would not operate to make the Government a party to said cause No. 8035 or to submit the Government to the jurisdiction of the Court in said cause No. 8035; and

It further appearing to the Court that in this cause No. 9913 the Government alleges and contends and the evidence shows that the Government acquired fee title to the properties of the District and to all lands within the boundaries of the District for use in connection with the Hanford Atomic Energy Project and that said properties and lands have been and will continue to be used by the Government exclusively for said military purposes; and it further appearing that the Government alleges and contends that the Government by reason of its ownership of said lands is the sole party interested in the assets of the District; and it appearing that the Government thereupon contends that the Government is entitled in equity to have the District dissolved, to have a receiver of the District appointed and to have the net assets of the District distributed to the Government; and

It further appearing to the Court that the tracts of lands within the boundaries of the Priest Rapids Irrigation District, whether acquired by the Govern-

ment by declarations of taking in the condemnation action, or by deeds from landowners with consequent dismissals in the condemnation action, or by other means, were acquired, owned and held and are being held, by the Government in its sovereign capacity exclusively for the military purposes of the Hanford Atomic Energy Project, purposes other than irrigation under the irrigation district laws of the State of Washington; and it appearing that as a matter of Federal and State constitutional and statutory law the tracts of land within the boundaries of the District acquired, owned and held by the Government for said military purposes never have been while held by the Government, and are not, subject to either the primary obligation or the secondary obligation or any other obligation to the District; and it appearing that the Government as owner and holder for said military purposes of said tracts of land within the District never has paid any assessments and as a matter of Federal and State constitutional and statutory law could not be subjected to any assessment of said lands by the District; and

It further appearing that said tracts of land within the boundaries of the District, in ownership by the Government for said purposes, were and are as free from being subject to bearing the burdens of the District as though said tracts of land had been formally excluded and withdrawn from the boundaries of said District; and that, as a matter of law and equity, acquisition of said lands by the Government for said military purposes had the same effect, so far as relationship between the Government and the District is concerned, as though the lands were formally excluded from the District by the Government's acquisition for said military purposes; and

It further appearing, as a matter of law and equity of the State of Washington, that the bene-

fits of ownership of lands within an irrigation district do not accrue to and can not be realized by landowners who never have paid District assessments, who never have held their lands subject to District assessments, who never have held their lands subject to the primary and secondary obligations of lands under the irrigation district laws of the State, and who never have been members of the group which is really interested in the success of the District, those who are subject to meeting its burdens;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, plaintiff herein, has no interest whatever in the assets of the Priest Rapids Irrigation District and has no basis for seeking distribution to the United States of the net assets of the District or for seeking the ancillary or incidental relief of appointment of a receiver; and accordingly, the plaintiff's complaint and petition for dissolution be and it hereby is dismissed with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, the defendants in this cause No. 9913 having sought an affirmative decree in their answer and counter petition only as an alternative to their prayer that the complaint and petition for dissolution be dismissed, the dismissal with prejudice of the complaint and petition for dissolution shall be the final and complete disposition of this cause No. 9913.

Done in open court this 27th day of April, 1950.

IAN R. MACIVER

Judge of the Superior Court.

Presented by:

J. K. CHEADLE

Of Attorneys for Defendants.

Copy received and notice of presentation waived:

HART SNYDER

Of Attorneys for Plaintiff.

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

MOULTON & POWELL AND J. K. CHEADLE, APPELLEES

MOULTON & POWELL AND J. K. CHEADLE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY AND ANSWER BRIEF FOR THE UNITED STATES

A. DEVITT VANECH,

Assistant Attorney General.

BERNARD H. RAMSEY,

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12563

UNITED STATES OF AMERICA, APPELLANT

v.

MOULTON & POWELL AND J. K. CHEADLE, APPELLEES

MOULTON & POWELL AND J. K. CHEADLE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON*

REPLY AND ANSWER BRIEF FOR THE UNITED STATES

I

**The Amount Paid by the Government to Satisfy the Judgment
in Favor of the District in the Condemnation Proceeding
Cannot Be Depleted to Pay the Attorneys Who Opposed the
Government in That Proceeding**

The amount allowed appellees by the order appealed from—\$55,000—was computed by the district court on the premise that through their services in the proceeding to condemn the District's properties a fund of

\$422,252.80 had been recovered. As is disclosed by the Government's opening brief, the allowance can be sustained only if in that proceeding the appellees rendered services which benefited those who are entitled to the \$422,252.80. Therefore the order is erroneous if all or any part of this sum is ultimately returned to the United States. For—as the Government has made plain—from the inception of the condemnation proceeding appellees opposed the claim of the United States to ownership of the District's assets. In short, the United States has not benefited from the services rendered by appellees.¹

However, appellees contend (Br. 26-27) that the order is justified because the judgment in the condemnation case declares that the District is “the only person having an interest in and to the \$422,252.80 and the District has consented to payment from the fund of the amount stipulated in the contingent-fee contract.” The quoted language merely shows that the federal courts have declined to decide between opposing claimants to the District's assets. Obviously it does not indicate that the money will be retained by the District. The District, long since out of business and now in process of liquidation, is at most a mere stakeholder. Indeed, the \$422,252.80, or what is left of it, will be kept

¹ Appellees call attention (Br. 25-26) to the statement of Mr. Ramsey that they were entitled to a reasonable attorney fee and assert “it is too late for the Government to disaffirm that concession now.” But the concession was withdrawn in the trial court (see R. 320-322). At the time, as disclosed by the Government's opening brief (pp. 10-11) the court stated that if the Government appealed he would increase the fee from \$50,000 to \$55,000. Mr. Ramsey then informed the court “that the government objects to the allowance of attorney's fees in this case in the sum of \$55,000 or any other sum” (R. 323).

in the court below until in the liquidation proceedings the state courts determine to whom it should be paid. As a result of the determination it will either be returned to the United States or paid to the former land-owners or part will be returned to the United States and the balance paid to the former owners. Consequently, appellees in the guise of attorneys for the District may not be paid from funds which should be returned to the United States.

Nor, contrary to appellees' further argument (Br. 28-32) is the order appealed from validated by the December 14, 1950 decision of the Supreme Court of Washington, rehearing denied January 26, 1951. In the first place, as the opinion in that case shows (Appellees' brief at p. 62), the superior court judgment which declared that the United States had "no interest whatever" in the District's assets was modified to declare that the United States "has no *exclusive* interest * * * in the assets of the * * * District and has no basis for seeking distribution to the United States of *all* the net assets of the District * * *." Thus the supreme court has not held that the United States is without any interest in the fund. On the contrary, as appellees recognize (Br. 31) that court did not decide whether in the case of lands conveyed to, rather than condemned by, the United States, the interests in the so-called non-irrigation properties—and hence in this fund—were transferred to the United States.

Unless and until this question is decided adversely to the Government there is no basis for the view that the United States had no interest in the fund and con-

sequently that an allowance of fees based on the whole amount is valid.

Secondly, and in any event, it is the position of the United States that the state court erred in holding that it is not entitled to the *entire* fund. While recognizing that the error can be corrected only by the Supreme Court of the United States, the Government believes that a brief contrast of this Court's decision in *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524, with that of the state court will demonstrate that the latter decision should not be given any weight in the consideration of this appeal.

Thus, this Court held that in the proceedings in the federal court to condemn the privately-owned lands in the District the former owners *had* received just compensation for all their interests in the District. However, it went on to hold that, since the District had to be dissolved in the Washington courts, the ownership of its assets on liquidation was to be determined by Washington law. But the state court's decision of December 14, 1950, is not based on the law of that State. Instead that decision is that in the proceedings in the federal court to condemn the privately-owned lands the former owners *had not* been compensated for all their interests in the District and hence all the assets of the District had not been acquired by the United States in these cases! Obviously, the ground upon which the state court rested its decision was not one of Washington law. Moreover, it was one that the previous decision of this Court prohibited it from considering.

The two opinions speak for themselves.

This Court said: "In these [individual condemnation] cases, the Government asserted that it intended to acquire all of the property within the District, *as a result of which it would then become the owner of the facilities and instrumentalities of the District.*" (Fn. 8, p. 528) "No appeals were taken from the awards in the cases * * * and the lower court was without the benefit of an expression from this court as to the 'rights' of these private landowners in so-called District assets which could or might have been asserted in these cases" (p. 528); and finally (p. 533): "It is certainly clear that as to those landowners, including the District, who sold their lands outright to the Government without condemnation proceedings, there could be no legal ground of their complaining as to the price they obtained. It is only as to those individuals whose lands were condemned that any rational grievance can exist, and as to them *their cases are res judicata, and not again to be inquired into collaterally in a state court dissolution proceeding or any other kind of state court proceeding*" [Italics added.]

But in the state court dissolution proceeding the Supreme Court of Washington put its decision on the ground that (Appellees' brief, pp. 60-61): "The United States did not acquire that interest in the non-irrigation properties from any landowner whose property it acquired solely through the condemnation procedure, as the extent and value of that interest was expressly excluded from the consideration of the jury when determining what such landowners were to be paid."

Because of the foregoing and of further considerations—one of which is that the state court's decision is

based upon facts which could only be found in transcripts of evidence (if any there are) and judgments which were not before that court—it is submitted that the decision has no tendency retrospectively to support the order appealed from.²

Further to support the allowance made to them, appellees assert (pp. 32-36) that the judgment of affirmance in *United States v. Priest Rapids Irr. Dist.*, 175 F. 2d 524, and the December 14, 1950, decision of the state court establish that they have compelled the United States to pay an additional \$422,252.80. But, as shown above (pp. 2-3, *supra*) appellees have no right to be paid from this fund if the United States recovers it. In the light of the fact pointed out at pp. 8-9 of the Government's opening brief that this Court's affirmance did not hold that the United States was liable to

² It should be noted that each of the state courts decided the case on grounds not advanced by appellees and hence not argued to them. Thus the superior court dismissed the Government's petition on the ground that Government lands could not be subjected to District assessments (see appellees' brief, pp. 69-71). Appellees had not so contended. In the supreme court the Government attacked the trial court's reasoning. But that court avoided passing on the question by itself raising another new and unbriefed ground, namely, that in the condemnation proceedings the United States had not paid for the interest in the "non-irrigation" properties.

It must be admitted that in departing from the issues presented to them the state courts followed the practice of the federal courts in the condemnation proceedings which culminated in this Court's decision at 175 F. 2d 524. Thus, the Schwellenbach formula was evolved by the district judge *sua sponte* to the dissatisfaction of both parties. The correctness of the formula was not—and could not be—tested until the Government took its appeal from the judgment in the above-mentioned condemnation proceedings. Then—despite the fact the validity of the Schwellenbach formula was squarely presented—this Court affirmed the judgment for the reason that ownership of the assets had to be determined by Washington law. Needless to say, neither party had argued to this effect nor, so far as Government counsel recalls, had the Court by questioning suggested such a solution of the appeal.

the former landowners for any additional amount and to the further fact, just pointed out, that the state court's decision is probably wrong, it is evident that appellees are premature in claiming that the services rendered by them benefited anybody.

Accordingly, it is submitted that the order awarding appellees \$55,000 of the \$422,252.80 is erroneous and should be reversed.

II

The District Court Was Without Jurisdiction to Entertain the Petition for Payment of Attorneys' Fees

It is the Government's position that there must be affirmative showing of the jurisdiction of the district court to award attorneys' fees in this case. Appellees assert (Br. 20-22) that the mere fact that a court has custody of an award in condemnation gives it jurisdiction to entertain claims against those to whom the fund would otherwise belong. This assertion, unsupported by apt authority, is clearly without substance. Equally without merit is the assertion (Br. 23) that appellees have an interest in the fund by reason of unspecified "attendant facts and circumstances shown in the record." Since the facts relied on are not set forth, there is no occasion to consider whether they would generate such an interest. It is submitted therefore that appellees have failed to show that the district court had jurisdiction to entertain their petition.

III

The Amount Allowed by the District Court Should Not Be Increased

Inasmuch as any allowance of attorney fees was unauthorized, it follows that, contrary to the contention of the cross-appeal (Br. 37-53) the allowance should not be increased to \$78,918.85.

CONCLUSION

For the foregoing reasons, it is submitted that the order appealed from should be reversed.

Respectfully,

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FEBRUARY, 1951.

In the
United States
Court of Appeals
For the Ninth Circuit

In the Matter of the Application for a Writ of
Habeas Corpus of GEORGE D. LATIMER,
Appellant,

v.

JOHN R. CRANOR, as Superintendent of the
Washington State Penitentiary at Walla
Walla, Washington, *Appellee.*

12504
No. 12503

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

FILED

JUL 3 1950

PAUL P. O'BRIEN,
CLERK

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In the
United States
Court of Appeals
For the Ninth Circuit

In the Matter of the Application for a Writ of
Habeas Corpus of GEORGE D. LATIMER,
Appellant,

v.

JOHN R. CRANOR, as Superintendent of the
Washington State Penitentiary at Walla
Walla, Washington, *Appellee.*

} No. 12563

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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In the
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No. 12563

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Appellant originally filed a petition for a writ of habeas corpus with the Supreme Court of the State of Washington which was denied without opinion by entry in the motion docket of said court on October 11, 1940, in Volume 8 at page 267 of said docket. A petition for rehearing on this matter was denied without opinion by the Supreme Court of the State on October 30, 1940, by order entered in the Journal of the court in Volume 36, page 212. A petition to the United States Supreme Court

for a writ of certiorari to the Washington court was denied on March 3, 1941. *Latimer v. Smith*, 312 U. S. 694, 61 S. Ct. 731, 85 L. ed. 1129. Appellant applied for a writ of error *coram nobis* to the Supreme Court of Washington, which application was dismissed without opinion by order of that court on November 27, 1941, entered in the court Journal, Volume 36 at page 382. On September 9, 1949, a petition for writ of habeas corpus to the Supreme Court of the State was denied without opinion by that court and an entry in the Motion Docket in Volume 9 at page 269.

Appellant thereafter petitioned the United States District Court for the Eastern District of Washington for a writ of habeas corpus (Tr. 3-5). An order was issued by the District Court to show cause why the writ should not issue (Tr. 5-6). Upon a hearing on said order (Tr. 10-40), the District Court ordered that the writ be denied on March 16, 1950 (Tr. 52-53). Thereafter appellant was granted a certificate of probable cause by the District Court (Tr. 54-55). Without citing authority for the jurisdiction of the District Court, appellant alleges in his petition below that he is held in custody in violation of the Constitution of the United States. This is a proper ground for invoking the jurisdiction of the United States District Court under 28 U. S. C. 2241. However, it is appellee's contention that the District Court did not have jurisdiction for the reason that appellant did not exhaust all the remedies available to him under the Laws of the State of Washington as required by 28 U. S. C. 2254. This contention will be discussed in detail as part of appellee's argument in support of the order of the District Court denying the writ.

STATEMENT OF THE CASE

Appellant is confined in the Washington State Penitentiary at Walla Walla in custody of appellee herein by authority of a judgment and sentence entered August 30, 1937, by the Superior Court of Stevens County, adjudging appellant to be guilty of the crime of first degree forgery and imposing as punishment therefor a term of twenty years' imprisonment. Appellant was released from the State Penitentiary on parole in July, 1935, and discharged from parole supervision in June, 1946, by order of the Board of Prison Terms and Paroles of the State of Washington (Tr. 41). Appellant's parole was revoked by order of said board in March, 1949. Appellant was again paroled in November, 1949, this parole was revoked January 18, 1950 (Tr. 50), and appellant was returned to the custody of appellee on February 4, 1950 (Tr. 52-53).

In his petition to the District Court appellant contends that his present confinement is void inasmuch as his original plea of guilty was obtained under duress. Appellant offered no evidence in this respect at the hearing below, and his principal contentions appear to be, initially, that the Board of Prison Terms and Paroles of the State of Washington was without authority to return him to confinement after discharging him from parole supervision; secondly, that the Board had no jurisdiction to determine the length of appellant's confinement. This latter contention is based on the allegation that appellant was confined under Chapter 114, Laws of Washington, 1935, which law required the discharge of a convicted person upon the serving of his minimum term of confinement as fixed by the Board of Prison Terms and Paroles. It is

appellant's position that the 1939 amendment to Chapter 114 operated ex post facto as to appellant in violation of Article I, section 10 of the Constitution of the United States. Appellant's argument on appeal appears to be confined to this contention, and he relies on a memorandum opinion of the Superior Court of the State of Washington for Yakima County. It is appellee's position that the 1939 amendment effected no substantial change in the law under which appellant was confined and that the above mentioned memorandum is not in point.

ARGUMENT

I.

The District Court did not have jurisdiction to entertain appellant's application for a writ of habeas corpus because appellant had not exhausted his state remedies at the time of petitioning for a writ of habeas corpus in the District Court.

Federal Courts are without authority to grant an application for a writ of habeas corpus on behalf of a person detained pursuant to a judgment of a state court until such person has exhausted his remedies in the courts of the state before making application in a court of the United States. 28 U. S. C. 2254 provides:

“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”

One of appellant's contentions in his petition to the District Court is that the Board of Prison Terms and Paroles was without jurisdiction to order his reconfine-ment in 1949 after having discharged him from parole supervision in 1946. This contention, as a matter of chronology, could have been raised only after he had been returned to custody, that is, in 1949 or thereafter. An examination of the records of the Washington State Supreme Court indicates that between March 3, 1941, when

his application for a writ of certiorari from the United States Supreme Court was denied, and the time of his application for a writ of habeas corpus in the District Court, appellant made only one application for a writ of habeas corpus in the Washington State Supreme Court which was denied on September 9, 1949. Appellant does not allege and the record does not show that an application for a writ of certiorari was made to the United States Supreme Court to be directed to the Washington court to review that denial. Nor does appellant allege or the record show that a petition for a writ of error *coram nobis* was made to the Washington State Supreme Court. In *Darr v. Burford*, decided April 3, 1950, 339 U. S. 200, 70 S. Ct. 587, 94 L. ed. 511, the United States Supreme Court held that an application for a writ of certiorari in the Federal Supreme Court to the State Supreme Court is a state remedy within the intendment of 28 U. S. C. 2254. To the same effect see *Cooper v. Cranor*, decided May 8, 1950, by this court. This court has held also in the cases of *Barton v. Smith*, 162 F. (2d) 330, and *Hampson v. Smith*, 162 F. (2d) 334, that a person confined in the State of Washington pursuant to a judgment of a court of the state must seek relief by applying for a writ of error *coram nobis* to the state court, even though the precise ambit of the writ has not been marked by the Washington court. A writ of error *coram nobis* is thus likewise considered to be a remedy available to persons confined in this state within the meaning of 28 U. S. C. 2254.

Appellant does not claim, nor does the record indicate, that there is an absence of available state process or that circumstances exist which render such process ineffective to protect his rights. State process being adequate and available to correct the alleged error in return-

ing appellant to the penitentiary in 1949, appellant's failure to apply for a writ of certiorari to the United States Supreme Court or to apply for a writ of error *coram nobis* to the Washington State Supreme Court must bar him from applying for a writ of habeas corpus in the Federal District Court.

II.

Appellant's discharge from supervision did not constitute a final release from confinement or satisfaction of judgment.

The Washington law, Chapter 114, Laws of 1935, as amended by Chapter 142, Laws of 1939 (Rem. Rev. Stat. Supp. 10249-1 et seq.), and Chapter 92, Laws of 1947 (10249-2, Rem. Supp. 1947), provides that upon conviction of a crime the sentencing court shall impose only the maximum term of imprisonment. Within six months after admission of such convicted person to the penitentiary or reformatory the State Board of Prison Terms and Paroles has the duty of fixing the duration of confinement for such prisoner. Until a prisoner has served his duration of confinement period, less good time credits, he is not eligible for parole consideration. When he has served such period he may be permitted to leave the confines of the penitentiary under such rules and regulations as the Board shall establish. In referring to Chapter 114, Laws of Washington, 1935, the Supreme Court of the United States in *Lindsey v. State of Washington*, 301 U. S. 397, 57 S. Ct. 797, 81 L. ed. 1182, stated as follows at page 798 (see appellant's Brief on Appeal, page 7):

“ * * * Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed

by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board
* * * .”

The discharge from supervision granted appellant in 1946 merely removed some of the conditions ordinarily incident to parole; it did not satisfy the sentence or waive the right and duty of the Board to maintain jurisdiction over the person of the parolee. The Board of Prison Terms and Paroles did not have the authority under the 1935 act or amendments thereto to completely discharge the appellant by irrevocably waiving jurisdiction over his person. Inasmuch as the statute permits the Board to return the paroled person to the confines of the penitentiary at its discretion, the Board was acting within its powers in revoking appellant's paroles.

III.

There has been no violation of the ex post facto prohibition of the Constitution of the United States.

It is appellant's final contention that the amendments to Chapter 114, Laws of 1935, under which laws he was confined, constitute a violation of the ex post facto provisions of the Federal Constitution. The material sections of Chapter 114 provide in part as follows:

“The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or the reformatory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him or her by the board of prison, terms and paroles, less time credits for good behavior and diligence in work as provided for by this board: *Provided*, That in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

“The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion.”

Section 4 of Chapter 114 was amended by Chapter 142, Laws of 1939, by the addition of the following language:

“ * * * * *Provided further,* That no prisoner shall be released from the penitentiary or the reformatory unless, in the opinion of the Board of Prison, Terms and Paroles, his rehabilitation has been complete and he is a fit subject for release, or until his maximum term expires.”

Appellee submits initially that there has been no substantive change in law by virtue of the 1939 amendment. Under the 1935 law, as interpreted by *Lindsey v. State of Washington, supra*, the Board of Prison Terms and Paroles was authorized to establish conditions of parole and to return a convicted person to confinement at its discretion. It had no power to terminate the sentence imposed by the court, nor was it given that power by the 1939 amendment. The additional language of Chapter 142, Laws of 1939, simply states what was part of the existing law by necessary implication. It only sets forth a standard to guide the Board in determining when an applicant for parole may properly be released on parole.

Assuming for this argument, that the 1939 amendment effected a substantive change in the law relating to parole, appellant has still not stated any grounds for the invocation of Article I, section 10. Parole has long been considered by the courts of the State of Washington to be a privilege and not a right. See *In re Pierce v. Smith*, 31 Wn. (2d) 52, 195 P. (2d) 112; *In re Grieve v. Smith*, 26

Wn. (2d) 156, 173 P. (2d) 168; *Fathers v. Smith*, 25 Wn. (2d) 896, 171 P. (2d) 1012; *State ex rel. Linden v. Bunge*, 192 Wash. 245, 73 P. (2d) 516. In *Milliken v. McCauley*, 20 F. Supp. 202, the District Court held, in construing the precise statute now under consideration, that parole is a matter within the discretion of the Board of Prison Terms and Paroles.

In *People ex rel. Kurzynski v. Hunt*, 25 F. Supp. 647, the laws of New York State relating to revocation of paroles were altered after petitioner's conviction and confinement. The court said:

“ * * * When petitioner was accorded this privilege and was released on parole, he took it with conditions thus attached to it by law, including the method then provided for determining parole violations. There was no constitutional guaranty when sentence was imposed upon petitioner that the provisions regarding parole and for determining violations thereof would remain constant. The only constitutional inhibition was that no law would be passed that would increase the punishment for the crime he had committed. * * * ”

The penalty for the crime for which appellant was convicted and sentenced has at no time material to this case been increased. The punishment was confinement for twenty years. In order to prevail, appellant must show that there has been such a change in the law between the commission of the crime and the sentence therefor as to subject him to an additional penalty. This has not been shown. It is appellee's position, therefore, that even had the laws relating to parole been so amended as to render the terms and conditions of that privilege more onerous, there has been no deprivation of a *right* within the intendment of the ex post facto provision.

The memorandum opinion issued by the Superior Court for Yakima County and relied upon by appellant in his Opening Brief does not present the issues on which his appeal is grounded. In the instant situation, appellant's allegation is that he was sentenced and confined under laws in force in 1935 and that amendments subsequent thereto operated in violation of the ex post facto prohibition of the Federal Constitution. In the situation to which the Yakima Court's opinion is directed, the petitioner therein complained that he was confined under laws in force prior to the time when Chapter 114, Laws of 1935, became effective, but that the 1935 laws had been illegally applied. The memorandum opinion of the Yakima Court is therefore not material to the case at hand.

CONCLUSION

It is appellee's position that the District Court was without authority to entertain appellant's application for a writ of habeas corpus because appellant had not exhausted the remedies available to him under the laws of the State of Washington; that appellant has not been discharged from the sentence under which he is now confined; and that his confinement is not in violation of the ex post facto provisions of Article I, section 10 of the Constitution of the United States. Appellee prays that the District Court's order denying the writ of habeas corpus be affirmed.

Respectfully submitted,

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No. 12,565

IN THE

United States Court of Appeals
For the Ninth Circuit

MILTON H. COX,

Appellant,

VS.

LIEUTENANT GENERAL A. C. WEDE-
MEYER, Commanding Officer of the
Sixth Army, Presidio, San Fran-
cisco,

Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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No. 12,565

IN THE
United States Court of Appeals
For the Ninth Circuit

MILTON H. COX,

Appellant,

VS.

LIEUTENANT GENERAL A. C. WEDE-
MEYER, Commanding Officer of the
Sixth Army, Presidio, San Fran-
cisco,

Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

This is an appeal from an order of District Judge Herbert W. Erskine of the District Court of the United States for the Northern District of California, Southern Division, filed April 27, 1950, dismissing appellant's petition for a writ of Habeas Corpus which alleged that the appellant was unlawfully imprisoned and restrained under the color of authority of respondents, the commanding officers of the Sixth Army, Presidio, San Francisco, and discharging the writ of Habeas Corpus theretofore issued.

I.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is founded upon Chapter 646, 62 Stat. 967, 63 Stat. 105, 28 U.S.C.A. Sections 2241, and 2253 providing for the issuance of writs of habeas corpus and for appeals from orders discharging the same.

The case arises under and involves the interpretation of the Selective Training and Service Act of 1940, Section 305g (50 U.S.C.A., appendix), the Selective Service Regulations, Sections 623.1, 627.13, 627.23, 627.25, issued thereunder, and Amendment 5 of the U. S. Constitution.

By order of this Court dated October 17, 1950, leave was granted to appellant to prosecute this appeal upon a typewritten transcript of the record, copies of which have been duly prepared and filed as required by Subdivision 2 of Rule 11 of this Court. Volume one of said transcript of the record contains the following pleadings and papers as the basis for this appeal:

Petition for writ of habeas corpus, order for issuance, and return;

Return to writ of habeas corpus;

Memorandum opinion of the Court;

Order discharging the writ of habeas corpus and dismissing petition;

Notice of appeal;

Designation of record;

Appellant's statement of points to be relied upon on appeal;

Appellant's and respondent's exhibits.

The notice of appeal on behalf of the petitioner-appellant herein was filed on April 28, 1950 and well within the sixty day period required of 28 U.S.C. Section 2107 and Rule 73 of the Rules of Civil Procedure of the District Courts of the United States in a case in which the United States or an officer or agency thereof is a party.

II.

STATEMENT OF THE CASE.

The statement of facts found by the lower Court and set forth in the Memorandum Opinion of District Judge Erskine, as filed in the transcript of record, is hereby accepted by appellant as a fair presentation of the basic facts of the case, and incorporated herein by reference.

Briefly summarized those facts are as follows:

On June 20, 1941, the appellant, Milton Harold Cox, returned his Selective Service Questionnaire to the Local Draft Board No. 111, Santa Clara County, California, as required by the Selective Training and Service Act of 1940. In this questionnaire the appellant indicated by appropriate notation that by reason of religious training and belief he was conscientiously opposed to participation in military service. At that time he made no claim to being a minister or student preparing for the ministry.

On June 25, 1941, the appellant personally delivered to the local board a letter claiming that he was

an ordained minister of religion for Jehovah's Witnesses, entitled to a IV-D classification, and requesting such classification. Apparently this letter with supporting documents was lost or misplaced in the records of the local board.

On February 6, 1942 the Special Form for Conscientious Objectors—DSS Form 47—was sent by the local board to the appellant.

On February 9, 1942 the appellant wrote to the local board enclosing copies of his letters of June 1941, stating that they were the basis for his requested classification as a minister of the gospel, and that he had been advised that the local board had no record of these letters.

On February 15, 1942 the chairman of the local board, Will B. Weston, made a written memorandum which was placed in appellant's selective service file to the effect that he had personally investigated appellant's objections to service, found them to be sincere, and recommended his classification as IV-E (conscientious objector). On February 19, 1942 the appellant filed with the local board the above-mentioned Form 47, Special Form for Conscientious objectors, in which he reiterated his claim for exemption as a conscientious objector and explained in detail the basis for the claim.

Nevertheless, the local board classified the appellant I-A-O. Therefore, on March 16, 1942 appellant appealed from this I-A-O classification and requested that the Appeal Board of Santa Clara

County place him in classification IV-D, minister of the gospel. This appeal is of importance in this case, and therefore is quoted in full. It reads as follows:

“Gentlemen:

I hereby appeal from the classification 1A-O given me by Santa Clara County Draft Board No. 111 and request that I be placed in class 4-D by reason of the fact that I am a minister of the gospel.

I am a member of Jehovah’s Witnesses and we are taught and instructed to preach the word of God direct from the Bible. Membership in the organization makes each member a minister of the gospel with the duty to preach the word of God.

I have not attended any religious school but have studied under the direction of the leaders in Jehovah’s Witnesses.

I am employed by Pacific Manufacturing Company during the day but hand out booklets and literature to people who are interested and play phonograph records to people who are interested and then return to talk with them upon request. I contend that these facts make me a minister and respectfully request that I be placed in class 4-D.

Respectfully submitted

Milton Harold Cox” (Sgd.)

On April 10, 1942 the Appeal Board returned the appellant’s file to the local board, affirming the I-A-O classification on the ground that the appellant did not appeal as a conscientious objector “but *only* be-

cause he claims to be a minister of religion", which latter claim could not be upheld. The letter denying the appeal reads as follows:

"Dear Sirs:

We are sending you herewith the questionnaire and file of Milton Harold Cox, No. 4685.

The action of your board in placing the registrant in Class 1-A-O has been affirmed.

The registrant does not appeal as a conscientious objector, but only because he claims to be a minister of religion. He says in his appeal that every member of Jehovah's Witnesses is a minister of the gospel. This would seem to leave no one to form the body of the church or congregation and this board is of the opinion that registrant does not qualify either as an ordained or as a regular minister of the gospel.

Very truly yours,

Board of Appeal No. 9

By C. C. Coolidge (Sgd.)

Chairman"

CCC:GOC

Inclosure

Upon advice from the State Director of Selective Service that the appellant's name was not listed on the Certified List of Jehovah's Witnesses who were entitled to consideration for a IV-D classification, the local board on May 8, 1942 notified the appellant that his I-A-O classification would stand.

On June 12, 1942 the appellant reported for induction at the induction station in San Francisco. He claims that he did not take the induction oath at this

time or at any time, but that he continued on to the Presidio at Monterey with his draft group on the representation that he would there get a further hearing on his classification.

Appellant was then sent to a basic training camp in Alabama. He refused to take part in military training and at the first opportunity boarded a train and returned to his home in San Jose, where he has resided openly ever since.

Appellant obtained a job with one of his former employers, thereafter changed his employment from time to time, but at all times remained in San Jose. He made absolutely no attempt to conceal his identity, or his address, or residence, or whereabouts. He was arrested by agents of the Federal Bureau of Investigation about May, 1949, almost seven years after he had left Camp Rucker in Alabama. During this period he has supported his wife, and so far as the record shows, has been a law-abiding, industrious citizen.

The Army did not turn over his name to the Federal Bureau of Investigation until April, 1949, and its agents had no trouble whatever in finding and apprehending him. They just went to San Jose, located him and arrested him. In this connection it might be mentioned that after his return to San Jose in discussing his military status with his employers, or prospective employers, he stated that he had received a medical discharge from the Army.

After his arrest he was turned over to the Army authorities, and tried by a court martial for desertion

in time of war, found guilty, and sentenced to five years at hard labor. This conviction was set aside and a retrial ordered. Pending this retrial he brought these proceedings.

The appellant contends that he was never legally inducted into the Army and hence is not subject to the jurisdiction of the respondents, and that even had he been so inducted, his prosecution by a military court seven years after the alleged offense is barred by statute of limitation.

It is admitted by the lower Court and proved by all the evidence that appellant was and is a sincere conscientious objector, who duly registered as such with his local draft board, the chairman of which after personal investigation reported to the board and recommended in writing that appellant be classified as such and assigned to non-military service. The chairman so testified at the hearing (R. 59-73) and his report to the local board was admitted in evidence as a part of appellant's selected service file.

The local board, however, completely disregarded the report of its own chairman and all evidence in appellant's selective service file proving his right to exemption from military service as a conscientious objector, and instead ordered him inducted into the Army. It is appellant's contention that this action was arbitrary, capricious and beyond the jurisdiction of the local board, and is a denial of due process of law, rendering its induction order invalid.

Appellant in addition to claiming exemption from military service as a conscientious objector, also claimed exemption as a minister of religion, pursuant to the accrediting certificate given him by his religious organization. When the local board classified him as I-A-O, he wrote a letter to the appeal board appealing from such classification, and stressing his right to exemption as a minister of religion. Appellant's second point is that, by this informal notice of appeal, he did not abandon his right to exemption as a conscientious objector.

Appellant's third point is that the appeal board failed to give due consideration to his appeal and to review the whole record, including his claim to exemption as a conscientious objector, as required by the Selective Service Act and Regulations, and also denied him due process of law in other material respects.

The District Judge admits in his opinion that the local board erred in refusing to classify appellant as a conscientious objector, but advances the theory that the invalidity of its induction order was somehow cured by the subsequent actions of the defendant, whether or not he refused to take the oath of induction into the Army. Appellant claims that a void induction order is a nullity, and cannot later be resurrected by subsequent acts outside of the jurisdiction of the issuing board. He also claims that his whole course of conduct thereafter, including his refusal to take the oath of induction, confirms and emphasizes his right to exemption as a conscientious objector, and estab-

lishes that he was never legally inducted into the Army, and hence not subject to military jurisdiction.

Finally, appellant contends that even had he been duly inducted into the Army and had deserted, the failure of the Army to arraign him for trial within three years after the alleged desertion occurred constitutes a bar to his prosecution, under the limitation contained in Section 3282 of the Federal Criminal Code.

III.

SPECIFICATION OF ERRORS.

The statement of points relied upon in this appeal, as filed in the transcript of record herein, is hereby incorporated in this brief by reference and made a part hereof. Briefly summarized the asserted errors of the District Court that are relied upon by the appellant are as follows:

1. In dismissing the petition for a writ of habeas corpus and discharging the writ of habeas corpus therefore issued.

2. In finding that Cox waived the invalidity and/or the irregularity of the induction order of the local board by his notice of appeal and/or by his subsequent conduct.

3. In failing to find that the action of the local and the appeal boards was arbitrary, capricious and a denial of due process.

4. In finding that Cox's appeal did not involve the question whether his claim as a conscientious objector should be sustained.

5. In failing to find that the appeals board should have renewed the whole record *de novo* and to classify Cox independently.

6. In finding that the appeals board complied with the requirements for preliminary review of the file.

7. In finding that the action of the appeals board in not reviewing the whole record and not classifying Cox independently was valid.

8. In finding that the induction order was valid.

IV.

ARGUMENT.

POINT I.

THE LOCAL BOARD'S CLASSIFICATION WAS ARBITRARY, CAPRICIOUS, BEYOND ITS JURISDICTION, AND A DENIAL OF DUE PROCESS, HENCE ITS INDUCTION ORDER WAS INVALID.

All of the evidence before local board No. 111 established the fact that Cox was a conscientious objector and entitled to be classified IV-E. His file contained a written memorandum of the board chairman, Will B. Weston, who had investigated his claim, stating that Cox was "A Jehovah's Witness claiming Exemption B. Checked with Purdy of Security who believes the objection to be sincere and not for evasion of

service, to which the internal evidence in Form DSS47 tends. Also—after physical examination, appropriate action would be IV-E or IV-ELS. Recommended by W. B. Weston 2/15/42.” (R 63.)

There was also some evidence before the board that Cox was entitled to a IV-D classification as a minister of Jehovah’s Witnesses, such as the internal evidence in his selective service questionnaire filed June 15, 1941; the ordination certificate of the Watch Tower Bible and Tract Society, the governing body of his denomination; and the certificate of W. O. Furtwengler, Company Servant (Leader) of San Jose Company of Jehovah’s Witnesses, that Cox “is serving as a minister of religion for Jehovah’s Witnesses.” (R 92-93.)

Even this information supported Cox’ claim that he was a conscientious objector. It was the practice of the local boards to regard all claimants for ministerial exemption as conscientious objectors, and to require them to file additionally the special conscientious objector’s form, as filed by Cox. (See *Lawrence v. Yost*, 157 Fed. (2d) 44.)

The local board prior to classifying Cox IAO made no investigation of his claim that he was a minister of Jehovah’s Witnesses. Indeed, there is not in his selective service file one shred of evidence upon which any finding could be based that he was not a recognized minister of his religious group. On the contrary, all of the evidence in the file on this point supports Cox’ claim. Only *after* Cox had been thus classified for military service and the appeal board,

without reviewing the record, had affirmed the classification, was the local board advised by the State Director of Selective Service that Cox' name was not on the list of ministers of Jehovah's Witnesses, which list was discontinued by order of the National Director of Selective Service, November 2, 1942. Thus this fact was of no importance; yet the local board upon that basis rather than from a determination of his status according to the facts of his individual case notified him that his IAO classification would stand.

The board did, however, investigate through its chairman, Will B. Weston, Cox' claim that he was a conscientious objector, with the finding, as aforesaid, completely sustaining this claim in every respect. The board's duty was therefore clear. On the basis of Cox' questionnaire, his Form 47, and the written memorandum of its chairman that Cox was a sincere conscientious objector, it was legally bound to classify him IV-E and assign him to non-military service.

The board, however, arbitrarily and capriciously and without one iota of supporting evidence classified him as IAO. Chairman Weston testified on the trial below that this was due to the great pressure exerted on the board by Selective Service headquarters to fill the heavy quotas allocated to it, and because of prejudice against Jehovah's Witnesses and conscientious objectors. (R 68-72.)

Having acted beyond its jurisdiction, the board then proceeded to ignore other provisions of the regulations governing its actions. Section 627.13 thereof required the local boards in all cases to prepare and

place in the file a written summary of any facts considered by the board which do not appear in the written information in the file. Opinion 14 (amended) of the director of Selective Service required them in the case of registrants who were Jehovah's Witnesses to place in the file of such a registrant "a record of all facts entering into its determination, for the reason that it is legally necessary that the record show the basis of the local board's decision." (See *Wesley Cox v. United States*, 332 U.S. 442, at page 450.)

These requirements are so fundamental that on an appeal the first duty of an appeal board is to make a preliminary review of the file to determine whether the record contains this written summary of all the facts considered by the local board in making its classification. If it does not, the record is incomplete and the file must be returned to the local board. (Sec. 627.23.) If this is not done the registrant is denied his right to an adequate consideration of his case on appeal and due process. (*Smith v. United States*, 157 Fed. (2d) 176.)

The local board here, however, failed in its duty to place any such summary in the file to support its classification of Cox as IAO; and clearly it could not do so, because all the information before it indicated that Cox was entitled to be classified as a conscientious objector. But if it had had any other information, it failed completely to perform its legal duty to show the basis of its classification.

The conclusion is inescapable here that Cox' 1AO classification was based upon a discrimination against

him because of his creed and membership and activity in Jehovah's Witnesses. Section 623.1 of the regulations forbids a classification on such a basis; and a board which acts in the teeth of the regulations is acting lawlessly and beyond its jurisdiction. *Estep and Smith v. United States*, 327 U.S. 113, 90 L. Ed. 567.

The powers of these boards which administer the Selective Service system established by the President under the authority of Section 10(a)(2) of the Selective Training and Service Act of 1940 and of the Courts to review their actions was under consideration in the *Estep* case. The Supreme Court held there that, although the statute made no provision for judicial review of the actions of such boards, the Court, nevertheless, could review their acts where the boards acted so contrary to the authority granted them as to exceed their jurisdiction. The authority of the boards to hear and determine all questions of exemption is limited to orders within their respective jurisdictions. It is only such orders that are final and not subject to judicial review. A classification for which there is no basis in fact is beyond the jurisdiction of the board, and may be judicially reviewed. (See also *United States v. Bowles*, 131 Fed. (2d) 818, affd. 63 Sup. Ct. 912; *United States ex rel. Bayly v. Reckord*, 51 Fed. Supp. 507; *Ex parte Stewart*, 47 Fed. Supp. 410.)

The Court, in the *Estep* case, gives as an example of an order beyond a local board's jurisdiction a classification or order to a registrant to report for

induction as available for military service because he is a Jew, a German, or a Negro. (In the instant case we have an 1AO classification of a registrant because he was a Jehovah's Witness.) It points out that it is dealing here with a question of personal liberty and that the stigma and penalties of criminality should not attach to one who wilfully disobeys an induction order which may be constitutionally invalid, or unauthorized by statute or regulation, or issued by mistake, or solely as the result of bias and prejudice. Constitutional rights are not to be impaired or destroyed nor illegal administrative discretion substituted for constitutional safeguards.

The Court below acknowledged its jurisdiction to review the action of the local boards where the record "discloses no substantial basis for the classification order made therein," and to declare the order of induction invalid; but it exercised that jurisdiction only to the extent of declaring that there was no basis in Cox' selective service record up to his classification for the order that was made. It stated that his file "up to the time of his appeal from the order giving him the classification of 1AO showed no basis for giving him any other classification than that claimed by him, to-wit: conscientious objector." (Transcript: Opinion, p. 7.)

The Court, however, confusing the fundamental difference between a constitutionally invalid order and a mere irregularity in procedure, refused to declare the induction order invalid, because "of what occurred in connection with his appeal from the first

order of his local board.” (Id. p. 7.) In other words, Cox’ subsequent conduct on his appeal cured the infirmity of this constitutionally invalid order issued with such a singular lack of procedural due process!

Apparently not very sure of itself, the Court went a step further and sought to bolster up this theory by stating that if Cox’ conduct in connection with his appeal did not have this effect, his conduct subsequent to the appeal, or after leaving the induction center, amounted to a waiver of any irregularity in his induction. (Id. p. 14.)

If there is one point which the *Estep* case makes clear, it is that the unconstitutional invalidity of an induction order may be urged at any time in any kind of proceeding, habeas corpus or criminal. As Mr. Justice Murphy said in the *Estep* case, *supra* (at page 125):

“To sustain the convictions of the two petitioners in these cases would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity to prove that the prosecution is based upon an invalid administrative order. That is a proposition to which I cannot subscribe. It violates the most elementary and fundamental concepts of due process of law. * * * To sanction such a proposition is to place an indelible ‘blot upon our jurisprudence and civilization’, *McVeigh v. United States*, 11 Wells (U.S.) 259, 267, 20 L. Ed. 80, 81, which cannot be justified by any appeal to patriotism or wartime exigencies.”

See also *Baxley v. United States*, 4th Cir., 1943, 134 Fed. (2d) 998, where the Court at page 999 said:

“If the order of the board is found to lack foundation in law or to be unsupported by substantial evidence, or to be so arbitrary and unreasonable as to amount to a denial of due process, the Court should treat it as a nullity * * *”

The cases cited by the Court in support of its novel theory (*United States v. Flint*, 54 Fed. Supp. 889, affd. *Altieri v. Flint*, 142 Fed. (2d) 62; *Mayborn v. Heflebower*, 145 Fed. (2d) 864; *Sanborn v. Callan*, 148 Fed. (2d) 376) simply do not support it. None of these cases involved an invalid induction order, but only an irregularity in the induction procedure. There was a basis in fact for all of the classifications in those cases, and they were therefore within the jurisdiction of the several boards.

Moreover, in the cited cases, there were express waivers by the registrants of the irregularities of induction procedures bottomed upon valid orders. While such irregularities may be waived either expressly or impliedly, a constitutional invalidity may not be. These cases are considered in detail hereafter, the *Flint* case on the discussion as to whether there was a waiver by reason of the notice of appeal (Point II); and the *Mayborn* and *Sanborn* cases on whether there was such a waiver after induction (Point III).

The other Courts which have considered this theory have rejected it. In *United States ex rel. Bayly v. Reckord*, supra, a local board intentionally and arbitrarily disregarded applicable regulations and selected

two married men for induction while there were volunteers and single men without dependents available to fill the quota. The government contended that the individual petitioners were estopped to complain of the invalidity of the board's order because of certain personal conduct. The Court held that such an argument "misconceives the purpose of the regulations", and that the regulation, whose "primary purpose was to express the national policy," "must be observed, not so much out of tenderness for the individual but for the public benefit." (at page 515).

In re Herman, 56 Fed. Supp. 733, the waiver theory was spurned in the case of a registrant who refused to submit to induction, but who donned a uniform, participated in some simple drills and in soldier activities, and did "carry on in a fashion, though not satisfactorily." (page 734.)

In *United States ex rel. Filomio v. Powell*, 38 Fed. Supp. 183, the Court held that there was no waiver of civil relief by conduct where a registrant submitted with unequivocal protest to induction. The Court held that he was not required forcibly to resist induction. The induction order was held to be valid, however, because the actions of the board were considered a reasonable exercise of its power to refuse a reclassification of the registrant.

The act of an appeal board in affirming a classification made without basis in fact cannot validate a constitutionally invalid act, but only accentuates it. Thus in all the cases where the Courts have judicially reviewed the acts of these administrative agencies,

there had been such an affirmance. (See *United States ex rel. Bayly v. Reckord*, supra; *United States ex rel. Lawrence v. Commanding Officer*, 58 Fed. Supp. 933; *Estep and Smith v. United States*, supra; *United States ex rel. Hull v. Stalter*, 151 Fed. (2d) 633; *Miller v. United States*, 169 Fed. (2d) 865; *Wesley Cox v. United States*, 332 U.S. 442, 68 S.Ct. 115, 92 L.Ed. 59.) In *Estep and Smith v. United States* the 1-A classifications given the registrants, who were ministers of Jehovah's Witnesses, were affirmed by the appeal boards, but the Supreme Court reversed their convictions for refusal to submit to induction into the armed forces on the ground of the invalidity of the induction orders.

The latest Supreme Court case to consider the requirement that an induction order must be based on substantial evidence, else it is constitutionally invalid, is *Wesley Cox v. United States*, supra. The Court there divided 5 to 4 on the question whether the evidence in Cox's file was substantial enough to prove that he was a minister of Jehovah's Witnesses. The late Justice Murphy's statement at page 458 is highly significant:

"This is a criminal trial. It involves administrative action denying that defendant has conscientious or religious scruples against war or that he is a minister. His liberty and his reputation are dependent upon the validity of that action. If the draft board classification is held valid, he will be imprisoned or fined and will be branded as a violator of the nation's law; if that classification is unlawful, he is a free man. Moreover,

he has had no previous opportunity to secure a judicial test of this administrative action, no chance to prove that he was denied his statutory rights. Everything is concentrated in the criminal proceedings. These stakes are too high, in my opinion, to permit an inappreciable amount of supporting evidence to sanction a draft board classification. Since guilt or innocence centers on that classification, its validity should be established by something more forceful than a wisp of evidence or a speculative inference. Otherwise, the defendant faces an almost impossible task in attempting to prove the illegality of the classification, the presence of a mere fragment of contrary evidence dooming his effort. And such a scant foundation should not justify brushing aside bona fide claims of conscientious belief or ministerial status. If respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding.”

What would the late Justice Murphy have said in the instant case, where there is not only no “wisp of evidence” in Milton Cox’s file to support the board’s induction order, but on the contrary, all the evidence therein absolutely supported his right to be classified as a conscientious objector assignable only to a civilian public service camp!

The instant case is clearly one where the local board flagrantly violated the rules and regulations which defined its jurisdiction. Search where you may, you will not find any other case where a board so completely disregarded all the written evidence in the

registrant's file, which is the only evidence it could legally consider. (Sec. 623.2.)

Cox was thus denied due process, and the induction order was therefore a complete nullity for all purposes. This infirmity was not cured by any subsequent acts of either Cox or the Appeal Board; but on the contrary, the failure of that board to review the whole record on appeal and to classify Cox independently on the basis of all the evidence in the file aggravated that denial of due process.

POINT II.

COX DID NOT ABANDON THE CLAIM THAT HE WAS A CONSCIENTIOUS OBJECTOR BY HIS NOTICE OF APPEAL.

Though the 1-A-O classification of the local board was a nullity, the Court below, on the authority of *U.S. v. Flint*, 54 Fed. Supp. 889, *affd.*, *Altieri v. Flint*, 142 Fed. (2d) 62, held that Cox abandoned the claim that he was a conscientious objector in his notice of appeal, and that the appeal was therefore limited to the question of whether he should have been classified as a minister of the gospel.

This highly legalistic view overlooks the fact that Cox's appeal was "from the classification 1AO given him by the local board", and therefore involved the whole record before that board and the question whether the evidence before the board was sufficient to sustain that classification. His mere request in the notice that he be given a IV-D classification did not relieve the Appeal Board of its legal duty to review

the whole record to determine if there was a basis in fact for the classification given him and then to classify him independently.

The lower Court disregards the highly informal character of the proceedings before these administrative boards, which are not Courts, and which do not permit lawyers to appear before them. (*Harris v. Ross*, 146 Fed. (2d) 355.) Their proceedings have been described as being “stripped of the panoply of formal judicial tribunals.” (*U.S. v. Pitt*, 144 Fed. (2d) 169.)

The Court’s view runs contra to the Congressional intent in these administrative proceedings, and deals with the registrant as though he were engaged in formal litigation, assisted by counsel, and therefore charged with the obligation of examining a record on appeal and drawing up an apt notice of appeal to preserve all errors in the record, at the risk of abandoning all those not specifically assigned.

Clearly the Court below has fallen into the error of drawing an analogy to judicial proceedings and appeals, where assignments of error are required by rules of Court and the failure to specify any particular claim of error constitutes a waiver. In these selective service cases, however, neither the Act nor the regulations issued pursuant thereto require a registrant who appeals from the classification given him by a local board to specify errors.

On the contrary, the regulations provide a most informal method and notice of appeal. Section 627.11,

entitled "How Appeal to Board of Appeal Is Taken", provides in paragraph (a) that "any person entitled to do so may appeal * * * (1) by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeals."

A more informal notice of appeals cannot be imagined. In *Chih Chung Tung v. U.S.*, 142 Fed. (2d) 919, the Court of Appeals for the First Circuit held a simple letter with the statement "I appeal again not to be drafted" a valid appeal. The Court said at page 921:

"From the Act itself and the regulation just quoted (627.11) it is evident that Congress and the administrative officials in charge of the Selective Service System intended not only to guarantee a right of appeal to registrants but also to permit registrant to take appeals freely and with a minimum of procedural formality * * * Viewed in the spirit of liberality and informality reflected by Regulation 627.11 above, we think the letter of September 29, 1942 constituted a valid appeal."

The notice given by the registrant in *U. S. v. Flint*, supra, was even more informal. There the registrant who, like Cox before the local board, claimed that he was entitled to classification either as a minister of

Jehovah's Witnesses or as a conscientious objector, appealed from a 1-A classification of the draft board without stating any grounds of appeal at all, but by a mere "endorsement on his questionnaire". This was held sufficient.

If these administrative appeals were to be assimilated to judicial appeals, how would we account not only for the fact that the notice "need not be in any particular form", but also for the complete absence of the usual required designation by the registrant of the portions of the record, proceedings and evidence which he wishes to be contained in the record on appeal? (See Rule 75, Federal Rules of Civil Procedure.) But in these selective service cases, such a designation or an assignment of errors is absolutely unnecessary, *since the review is on the whole record*, as in an admiralty appeal. (*U. S. v. Pitt*, *supra*; *Reel v. Badt*, 53 Fed. Supp. 906, 907; *Cramer v. France*, 148 Fed. (2d) 801.)

Nor does Section 627.12 of the Regulations have the effect of requiring an assignment of errors. It merely provides that a registrant who takes an appeal "*may* attach to his notice of appeal or to the Selective Service questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, *may* direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and *may* set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

This section was interpreted in *Niznick v. U. S.*, 173 Fed. (2d) 328, and *Smith v. U. S.*, 187 Fed. (2d) 176. The registrants claimed a denial of due process because their files on appeal failed to contain a written summary of all the facts considered by the local board in making its classification. The government contended there that because the registrants held the power to correct the record by attaching to their notices a statement specifying the failures and errors of the local boards, but omitted to do so, they could not complain later; that is to say, they waived the errors which they had failed to specify in their notice. The argument is very similar to the one made by the lower Court herein, that Cox could have claimed in his notice the error of the local board to classify him as a conscientious objector when all the evidence before it showed that he was one, but having failed to do so, he abandoned that claim.

This argument was twice rejected by the Circuit Courts, which held in both of the above cases that the failure of the registrants to so specify the errors of the local board did not constitute a waiver of the right to urge these errors on appeal, nor did the omission relieve the appeal boards of their duty to review the whole record and file of the registrant, or mitigate the consequences of their failure to do so.

Holding the provisions of Section 627.12 as merely directory, the Court in the *Smith* case stated, (p. 183):

“The Regulation confers a privilege but does not impose a duty upon the registrant, for it cannot

be supposed that Congress intended to deal with registrants as if they were engaged in formal litigation assisted by counsel and are therefore charged with the obligation to examine and approve a record on appeal.”

The lower Court here, however, would place the heavy burden on every registrant who appeals from a classification by a local draft board to examine and approve the transcript of record for the purpose of detecting error and the preparation of a notice of appeal, a burden which Congress never intended to place upon inexperienced litigants, appearing without the aid of counsel, in these non-judicial proceedings.

The intent of Congress with respect to conscientious objectors is frustrated in another respect. Congress has surrounded these claimants with a special safeguard. Section 305(g) of the Act provides:

“Nothing contained in this Act shall be construed to require any person to be subject to combat training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combat training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combat service as defined by the President, or shall, if he is found to be conscientiously opposed to participate in such non-combat service, in lieu of such induction be assigned to work of na-

tional importance under civilian direction. Any such person claiming such exemption from combat training and service because of such conscientious objection shall, if such claim is not sustained by the Board, be entitled to an appeal to the appropriate appeal board provided for in Section 10(a). Upon the filing of such appeal with the Appeal Board, the Appeal Board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the Appeal Board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to non-combat service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such non-combat service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If, after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained.”

Section 627.25 of the Regulations provide:

“If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the board

of appeal shall first determine whether the registrant should be classified in one of the classes set forth in Sec. 623.21 or in the order set forth, and if so determined, it shall place such registrant in such class. If the board of appeal does not determine that such registrant belongs in one of such classes, it shall transmit the entire file to the U. S. District Attorney for the judicial district in which the local board of the registrant is located for the purpose of securing an advisory recommendation of the Department of Justice. * * *

The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the board of appeal that if the registrant is found to be conscientiously opposed to participation in such non-combatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the board of appeal that such objections be not sustained.”

The Court below reads a special requirement into the Act and the Regulations. Whenever a registrant wants to appeal from a classification of a local board which ignores his claim that he is a conscientious objector, his notice of appeal (unlike in other cases) must state that he claims to be such.

A proper reading of section 305(g) of the Act and the regulations indicates that an appeal involving such a claim is not a special kind of appeal. The word “such” in the phrase “upon the filing of such appeal” relates back to the words “an appeal” and merely means “this”. The statement does not impose an additional procedural burden on a registrant, but only an additional safeguard in his favor, to wit, the necessity of a reference of such claim to the Department of Justice for an investigation.

The Court below is so confused about the true nature of a waiver at law that it speaks of Cox as having, if not expressly at least “impliedly” abandoned his claim to be classified a conscientious objector. It is elementary that there can only be a waiver of a right where there is a “voluntary abandonment or surrender by a capable person of a right *known to exist* with the intent that such right shall be surrendered and such person forever deprived of its benefits.” *Serman v. Roberts*, 191 S.W. (2d) 824, 825, 826, 209 Ark. 586.

“A waiver cannot be based on mistake or negligence.”

Tetreault v. Campbell, 61 A. (2d) 591, 115 Vt. 369.

“It is a conscious, deliberate relinquishment of a known right.”

Orlando v. Camden Co., 39 A. (2d) 238, 132 N.J.L. 173;

Du Bois Nat. Bank v. Hartford Accident and Indemnity Co., 161 Fed. (2d) 132;

Missouri State Ins. Co. v. Le Fevre, 10 S.W. (2d) 267, 269.

Certainly in a proceeding like this where, as the Supreme Court reminds us in the *Estep* case (*supra*, at p. 118), we are dealing with a question of personal liberty, where a registrant who violates the Act commits a felony, we should be loath to resolve any doubts which might exist against a registrant. A waiver under these circumstances should not be lightly found.

If Cox waived his right here, it could only have been by mistake or negligence and therefore no waiver at all. Is it not patently absurd to argue that a young man of twenty-four years of age, unlearned in the law and acting without legal advice (R. 117-118), and generally inexperienced in Court proceedings should know that by writing a letter to an appeal board in which he fails to repeat a claim he previously established before the local board that he is a conscientious objector, thereby “voluntarily” abandons his right to make that claim before the appeals board?

It is a matter of general knowledge that in 1942 and the early years of the war, there was considerable confusion as to whether members of Jehovah’s Witnesses could claim exemption both as conscientious objectors and as ministers. All of the cases relating to the members of this sect reflect this confusion. (*Wesley Cox v. U. S.* (*supra*); *Dodez v. U. S.*, 154 Fed. (2d) 637; *Niznick v. U. S.* (*supra*); *Smith v. U. S.* (*supra*); *U. S. v. Pitts* (*supra*).)

Wesley Cox v. U. S. (supra), is typical. There one of the registrants involved, Roisum, filed first a claim to a minister's exemption and later a conscientious objector's form, which the Court observed was "apparently filed under misapprehension, since Roisum did not abandon his contention that he should be classified as a minister".

This Court itself in *Lawrence v. Yost*, 157 Fed. (2d) 44, at page 45, points out the fact that "from a number of cases which we have reviewed, it seems to be general practice for the boards to require all registrants who claim to be ministers to fill out this form. (Form 47, Conscientious Objector.)"

The record here shows that the same confusion existed in Cox's mind. He testified emphatically that he had no intent to abandon his claim to be a conscientious objector when he wrote the letter to the Appeal Board. Cox sincerely thought he was a minister, and he had a certificate from the Watch Tower Bible and Tract Society certifying that he was "an ordained minister of Jehovah God to preach the gospel", as well as one from his "Company Servant", or church superior, W. O. Furtwengler, San Jose Company of Jehovah's Witnesses, certifying that Cox "is serving as a Minister of Religion for Jehovah's Witnesses". (R. 102, 93.) Furthermore, in his letter to the appeal board he stated that he engaged in the part-time religious activity of handing out booklets and literature and played phonograph records to people who were interested, and then returned to talk to

them upon request, a form of door-to-door evangelism recognized by Opinion No. 14 of the Director of Selective Service and the United States Supreme Court in *Wesley Cox v. U. S.* (supra).

This opinion appended a list of certain Jehovah's Witnesses "pioneers" who were entitled to exemption as ministers, and described certain tests to be applied in determining what other Witnesses were entitled to the exemptions, which included the amount of time spent in religious activity. Cox was regarded by his own religious superior as a "pioneer", yet no proof was ever taken by the Board as to how much time he spent in such activity.

It was not until 1947, when the Supreme Court of the United States decided the *Wesley Cox* case (supra) that the status of those ministerial witnesses not on that list was cleared up. In the light of the decision it would appear that the Court below erred in stating that there was no basis in fact for Cox's claim that he was a minister. The evidence in his file met the requirements of four judges of that Court. Mr. Justice Douglas in his dissenting opinion in the *Wesley Cox* case (supra, at page 455), concurred in by Justices Black, Murphy and Rutledge, stated that not only the full-time ministers of the orthodox faiths are included in the exemption, but also the "part time ministers" of the less conventional ones. "These part-time ministers are vehicles for propagation of the faith. By practical as well as historical standards they are the apostles who perform the minister's function

for this group. Their door-to-door evangelism is as much religious activity as worship in the churches and preaching from the pulpits."

Assuming, however, *arguendo* that the Court was correct in its statement that Cox' claim to be a minister was not "supported in any respect by his selective service file," could anyone seriously argue that if this were true, and he had definitely established his "C.O." claim, Cox would voluntarily have abandoned the established claim for the one without basis in fact?

What if he had been advised of his rights by a lawyer or the local Appeal Board? What if he had been told that the record before the local board *completely established* his right to classification as a conscientious objector and that the 1AO Classification, having no basis, was invalid, and that he had only to appeal on that and on no other ground? What if he had been asked by the Appeal Board, as was the registrant in the *Flint* case, whether he intended to rely solely on one or the other ground? And where, all this time, was the Government's Appeal Agent, specifically charged by statute with aiding just such inexperienced appellants as Cox? Could it be that he, too, was prejudiced against Jehovah's Witnesses? If we pass for the moment Cox's strong religious conviction that he would be subject to eternal damnation if he participated in a war, and consider only his obvious self-interest, would even obdurate government counsel contend for one moment that he would have waived the

proved claim which would have served his interest for one which could not be established?

The *Flint* case (supra) relied upon by the lower Court for its novel theory of implied abandonment, does not support any such view at all. The facts of that case show that the abandonment there was had *after* the appeal had been perfected, and so is no basis for holding that a ground may be waived by a failure to set it forth in the notice. There the registrant was given the regular conscientious objector's hearing, which Cox was never given. At that hearing, the hearing officer inquired of him whether his appeal was based on the claim that he was an ordained minister or whether it was on the ground that he was a conscientious objector, or upon both. The registrant replied that his appeal was based "solely on my claim of being an ordained minister."

Clearly this was an express waiver, if there could ever be one. It was comparable to those familiar situations in criminal cases where a defendant can only waive his rights in open Court on his own *voir dire*, and after the Court finds that the defendant understands his right and freely waives it.

There is another fatal weakness in the *Flint* case. There was there "at most only scant evidence of religious scruples against participation in war". Though the registrant told the board that he did not believe in fighting, this statement was expressly made in support of his claim for classification as a minister,

and the Court found that the relator's objections were not necessarily attributable to religious scruples, but could have been attributable to a state of mental confusion or emotional instability or from inadequate sleep and nourishment.

In the instant case, however, Cox's claim had been completely established even to the satisfaction of the chairman of the local board, Will B. Weston, who placed his written memorandum in Cox's selective service file to the effect that he personally investigated his claim and found his objections to military service to be sincere, and recommended his classification as IV-E—Conscientious Objector. (R. 63, 72; Appellant's Exhibit 3.)

Additionally, Cox testified in the lower Court that he could not participate in a war, as he would be breaching his covenant with God, and would thereby incur the dreadful penalty of eternal damnation. Thus his objections to service were clearly attributable to conscience and religious convictions. (R. 19-20.)

Cox's state of mind as to whether he ever intended to waive the claim that he was a "C.O." is shown by his conduct subsequent to the Appeal. At the trial he testified that the secretary of the local board told him that he would be given a hearing at the induction center on this claim; that when he appeared for induction in San Francisco, he told the officer there that he was a C.O. and was told by him to go ahead with his physical examination and that he would be given a hearing in Monterey, and that at Monterey he was

told that he would get a hearing on his claim at Camp Rucker. There, too, he asked for such a hearing, but never got one. (R. 30, 32, 33, 41.) He wrote a letter to his wife from there in which he stated that he was having trouble with the commanding officer because he was a conscientious objector. (Exhibit 4; R. 36, 82-85.) This testimony, which was uncontradicted and therefore binding on the Court, clearly indicated that Cox never for a moment believed that he had waived his claim to exemption as a C.O.

If there was no review on appeal, there was no appeal, and the notice of appeal would be ineffectual for any purpose. It is, moreover, difficult to see how there could be a waiver by the notice of appeal of any ground of appeal involved in the registrant's file where the *very appeal* itself is not considered a waiver of the basic invalidity of an induction order which is beyond the jurisdiction of the board and is therefore a nullity. (*Estep and Smith v. U. S.* (supra); *U. S. ex rel. Hull v. Stalter* (supra), and other cases cited under Point I hereof.)

It is respectfully submitted that Cox did not waive his claim to be classified as a conscientious objector by his notice of appeal, nor did he waive the constitutional invalidity of the classification of the local board, either by his notice or otherwise.

POINT III.

THE APPEAL BOARD FAILED TO GIVE ADEQUATE CONSIDERATION TO COX' APPEAL AND TO REVIEW THE WHOLE RECORD AND HIS CLAIM TO BE A CONSCIENTIOUS OBJECTOR, AND DENIED HIM DUE PROCESS IN OTHER MATERIAL RESPECTS.

The denial of due process by the local board was accentuated by the action of the appeal board established by the President under the authority of Section 10(a)(2) of the Act (50 U.S.C.A. App. Sec. 310(a)(2) 11, FCA Tit. 50, App. 5, Sec. 10(a)(2)) in failing to follow the provisions governing appeals to the Boards of Appeal contained in Sections 627.1 to 627.61 of the Regulations, and the special appeal procedure for conscientious objectors set forth in Section 305(g) of the Act.

When an appeal is taken, one of the first duties of the appeal board is to make a preliminary review of the file. Section 627.23 of the Regulations provides that "the appeal board will carefully check each file to determine whether all steps required by the Regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If any steps have been omitted by the local board, * * * if the record is incomplete, or if the information is not sufficient *to enable the appeals board to determine the classification of the registrant*, the appeal board shall return the file to the local board with a request for additional information or action.

The appeal board here did not follow the Regulations. If it had done so, it would have discovered the

fact that the file did not contain the written summary of the facts forming the basis of the local board's 1AO classification, as required by both Opinion 14 and Section 627.13, and would have returned the file to the local board with a request that such a summary be included.

The failure of the local board to include such a statement and of the appeal board to require its inclusion is in itself the denial of an adequate consideration of the appeal which amounts to a denial of due process. (*United States v. Garvin*, 71 Fed. Supp. 545; *United States v. Walden*, 56 Fed. Supp. 777.) In *Smith v. United States*, 157 Fed. (2d) at page 176, the Court said:

“These regulations clearly require that the record of a registrant on appeal to the board of appeal shall contain a written summary of all the facts considered by the local board in making its classification, and since the conclusions of the board of appeals are necessarily based upon the written record, omission of material facts deprives the registrant of his right to an adequate consideration of his case on appeal and amounts to a denial of due process by the local board which invalidates its classification and order of induction into the armed services.”

See also *Niznick v. United States*, 173 Fed. (2d) 328; cer. denied, 69 S.Ct. 1169, where the Court said:

“Since the conclusions of the board of appeal are necessarily based upon the written record, omission of material facts deprives the registrant of an adequate consideration of his case on appeal

and amounts to denial of due process by the local board, which invalidates its classification.”

The next duty of the board was to review *de novo* the whole record as in an admiralty appeal, and to classify the registrant independently. (Regulations, Sec. 627.26(a); *United States v. Pitt*, supra; *Reel v. Badt*, 53 Fed. Supp. 960; *Cramer v. France*, 148 Fed. (2d) 801.) The Ninth Circuit Court of Appeals in the latter case decisively settled this point. The hearing before the appeal board must be *de novo*: “The action of the board of appeal completely supersedes the action of the local board in classifying applicants.” (at page 801.)

The Third Circuit Court of Appeals in deciding *United States v. Pitt*, supra, gives an excellent summary of the requirements laid down by the Act and Regulations with respect to appeals. After pointing out that the procedure is not technical, since lawyers are not allowed to appear before either the local or appeal boards in behalf of registrants, the Court states:

“It (the Selective Service Act) provides that no information in respect to any registrant may be considered by a local board unless it is reduced to writing and placed in the file of the registrant * * The right of a registrant to appeal his classification to the appeal board is absolute and unconditional. The boards of appeal in substance must dispose of each case on the record sent to them by each local board, and local boards are admonished to refrain from expressions of

opinion or argument in support of their decisions. See Sec. 627.13(b) of the Regulations. An appeal board is bound in no wise to award to registrant the classification given him by his local board; in fact, an appeal board must hear and dispose of each case *de novo in the same manner as must an appellate tribunal on an appeal in admiralty*. See 627.2(a) of the Regulations. Each appeal board, therefore, independently imposes a classification upon a registrant without regard for that which was given him by his local board. Moreover, the classification of the appeal board supersedes that of the local board * * * The proceedings before the local board and the appeal boards are informal, stripped of the panoply of formal judicial tribunals.” (Italics supplied.)

Thus in every case, no matter what the claim involved may be, the whole record goes up on appeal, and this irrespective of what the registrant may state in his notice or whether he states anything at all.

What would be the purpose of sending up the whole record if not that the appeal board should review it to enable it to classify the registrant on the basis of its own examination of the record, independently of the local board, as required by Sec. 627.26(c) of the Regulations?

The appeal board here made no such review of the file. Though Cox was entitled to an adequate consideration of his appeal, it gave him none. It merely noted that he had not appealed as a conscientious objector (in other words, he had not assigned as error the failure of the local board to so classify him), but as a minister of religion. Without reviewing even that

claim, on the basis of his statement in his appeal that “every member of Jehovah’s Witnesses is a minister of the gospel”, and because it arbitrarily asserted that if this were true, it “would seem to leave no one to form the body of the church or congregation” (Transcript: Opinion, p. 4), it affirmed (not classified independently) the 1AO classification of the local board.

The attitude and action of the board here is to be contrasted with that of the Court in *United States ex rel. Hull v. Stalter*, supra, where the registrant in his notice set forth the same statement. The Court there said (at page 637): “We do not agree with relator’s argument that all members of the organization are ministers and exempt from military service”; yet it held that upon all of the facts he was entitled to be classified as a minister, stating:

“Neither do we agree with the government’s argument that the activities and doings of all the members of the organization may be taken into consideration in determining whether a particular member is entitled to exemption. In our view, every registrant, whether he be Jehovah’s Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant’s classification should be determined by the realities of the situation, not merely by what he professes.”

It should be pointed out that not only did the appeal board fail to handle Cox’ claim to be a minister intelligently, but neither did the local board, either before or after the appeal. After the appeal board affirmed the classification, the local board notified Cox

that, upon advice from the State Director of Selective Service that his name was not listed on the certified list of Jehovah's Witnesses who were entitled to exemption as ministers, the 1AO classification would stand. The Court in the *Hull* case (supra) held that the fact that a registrant's name was not on that list was of no importance, but that he was entitled to have his own status determined according to the facts of his individual case. Opinion 14 dealing with Jehovah's Witnesses and the Supreme Court in *Cox v. United States* (supra) also require such a determination in the case of a claimant whose name is not on the list, which list was finally completely disavowed by the National Director of Selective Service as of no use whatsoever.

Irrespective of the merits of this claim, if the appeal board had reviewed the whole file it would have found not only the complete absence of any evidence to support the local board's classification, but also the memorandum of Chairman Will B. Weston which completely established Cox' right to a IV-E classification as a conscientious objector. Instead of merely affirming the classification without even examining his complete file, it would have classified him independently, as required by Section 627.26(c) of the Regulations.

The appeal board, as a corollary to its failure to review the whole record, also failed to comply with the requirements of Section 305(g) of the Act and Section 627.25 of the Regulations, which made it mandatory upon the Board where conscientious objections to military service are involved to refer the file to the

Department of Justice for further investigation and a formal hearing.

The Court below excused the failure of the appeal board to review the whole record on the theory that Cox abandoned the claim that he was a conscientious objector by his notice of appeal, and that therefore this claim was not involved in his appeal. This unsound argument has been disposed of under Point II above. The fact of the matter is, however, that even if it were to be conceded, *arguendo*, that he did so, what about his claim to be a minister? The Board did not even review the information in the file on that claim.

The Court states that to require the Appeal Board to examine the entire file would be placing "a burden upon such a board never intended by the Act or Regulations and entirely inconsistent with the natural exigencies which said Act and Regulations were intended to meet." (Transcript: Opinion, p. 10.)

The Court again falls into the error of drawing an analogy to judicial proceedings where the transcript of record of a proceeding before the lower Court may have involved days of trial, with a voluminous record. The hearings before the local boards, however, are only a matter of a few hours at most (here there was no hearing); and the transcripts are quite simple, consisting at most of the questionnaire and written summary of facts and other documents in the file. One has only to look at the transcript in this case to see how simple it is.

A similar argument made in the *Estep* case, supra, a criminal prosecution for refusal to submit to induction into the armed forces, was rejected by the Supreme Court, Mr. Justice Murphy, in a concurring opinion, stating at pages 444, 432:

“It is urged that the purpose and scheme of the legislative program necessitates the foreclosure of a full hearing in a criminal proceeding under Section 11. The urgent need of mobilizing the manpower of the nation for emergency purposes and the dire consequences of delay in that process are emphasized. * * * This is at best a poor excuse for stripping petitioners of their rights to due process of law. * * * Adherence to due process of law in criminal trials is unlikely to impede the war effort unduly.

“We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. But the war is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and with a sense of proportionate values.”

The Court in *United States ex rel. Bayly v. Reckord*, supra, said at page 515:

“It is to be appreciated that these local boards are performing a highly important public service without compensation and are entitled generally to credit and appreciation of the public for their cheerful performance and uncompensated public service. They are, however, not above the law, and like other public officers, must comply with it.”

It is respectfully submitted that both the local and appeal boards here violated the most elementary and fundamental concepts of due process of law, which cannot be justified by any appeal to patriotism or wartime exigencies, and that Cox was denied his right to a serious and adequate consideration of his appeal by the appeal board's refusal to review the whole record and reclassify him *de novo*, and its dismissal of his appeal upon the basis of a statement made in his notice with which it disagreed.

POINT IV.

COX DID NOT AT ANY TIME SUBSEQUENT TO THE ACTION OF THE APPEAL BOARD WAIVE THE INVALIDITY OF THE INDUCTION ORDER.

A registrant may at any time urge the constitutional invalidity of an induction order, since "Before a person may be punished for violating an administrative order, due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights." *Estep and Smith v. United States*, supra, at page 126.

It is only an irregularity in the induction proceeding itself, such as in the taking of the oath, which may be waived. The two Fifth Circuit Court decisions cited by the Court below illustrate this distinction. In neither *Mayborn v. Heflebower*, 145 Fed. (2d) 864, nor *Sanborn v. Callan*, 148 Fed.(2d) 376, were the induction orders attacked as arbitrary and

invalid and beyond the jurisdiction of the Board. Both registrants merely claimed that they had not been inducted into the Army because they had not taken the oath. Both relied on the Supreme Court decision in *Billings v. Truesdell*, 321 U.S. 542, 64 S.Ct. 737, which held that, as the Army and Selective Service Regulations stood in August, 1942, the actual induction which under Section 11 of the Act was a prerequisite to the right to try a selectee by court-martial for disobedience to an order, does not take place until he has taken the oath of induction.

The induction in these two cases, however, took place in 1943, when a new regulation was in effect. As the Court observed, this one was different from that considered in the *Billings* case (and that which existed at the time of Cox' alleged induction), since it specifically provided that "in the event of refusal to take the oath (or affirmation) of allegiance by a citizen, he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States." In these latter cases, the theory was that the oath was a mere formality; but back in 1942 when *Billings* and *Cox* reported for induction, it was a *sine qua non*, and so held by the Supreme Court in the *Billings* case.

It was also the law then that until a registrant had taken all the steps in the selective service process and had been finally accepted by the armed forces, he had not exhausted his administrative remedies so as to entitle him to judicial review of his classification. In *Falbo v. United States*, 320 U.S. 546, 64 S.Ct. 346, 88

L. Ed. 305, the Supreme Court held that a registrant could not defend a criminal prosecution under Section 11 of the Selective Service Act for refusing to submit to induction on the ground that he was wrongfully classified and was entitled to a statutory exemption, when the offense was a failure to report for induction into the armed forces or for work of national importance.

It was not until 1947, when the Supreme Court decided the *Estep* and *Smith* cases (*supra*) that the mere reporting for induction without being actually inducted was finally deemed sufficient, and that at that point a registrant exhausted his administrative remedies and could begin a judicial review. Thus, whether Cox took the oath or not (and his testimony that he did not was uncontradicted), it was still necessary for him to report to the induction center at San Francisco in order to exhaust his administrative remedies and thus to place himself in a position to seek a judicial review of his classification and purported induction. This he did. Moreover, he had the right to submit to induction rather than face criminal prosecution for disobeying the order. (*Ex parte Yost* (Southern Dist. of California, 1944), 55 Fed.Supp. 768; *affd.* 157 Fed.(2d) 44.)

As to the question of whether Cox took the oath, his testimony on this point was clear, and was the same kind of testimony that was given in other cases of this kind and accepted by the Courts. The Court below appears to believe that this testimony should have been corroborated in some way by Cox, and that his

“attempted corroboration” was insufficient, referring to his statement that he told the officer in charge that he had not taken the oath, that he telephoned his wife from Monterey and told her that he had not taken the oath, and that he told other persons the same thing. (R. 30-33, 35-36, 41, 74-75, 80-81, 82-83, 85, 104.)

Though this as well as the confirming testimony of his wife and the persons to whom he made these communications, and his subsequent conduct and trouble with his battery commander (R. 33-34, 74-75, 80-81, 82-83, 85, Pets. Exhibit No. 4) constitute ample corroboration, the fact is his testimony did not need to be corroborated to be believed. It was within the power of the Government to disprove the fact that he had not taken the oath by producing the officer in charge of the induction ceremony or Cox’ signature to the oath. The burden of proof was on it to show that he had become a member of the Army and subject to its military jurisdiction. It alone kept and controlled all the Army records. (*Vermehren v. Sirmeier*, 36 Fed. (2d) 876; *Givens v. Zerbst*, 225 U.S. 11, 41 S.Ct. 227, 65 L.Ed. 475.)

The rule with respect to the binding force on a Court of uncontradicted testimony is stated in 32 C.J.S., par. 1038, at page 1089:

“Uncontradicted or undisputed evidence should ordinarily be taken as true. More precisely, evidence which is not contradicted by positive testimony or circumstances and is not inherently improbable, incredible or unreasonable cannot be arbitrarily or capriciously discredited, disregard-

ed or rejected, even though the witness is a party in interest, and unless shown to be untrustworthy is to be taken as conclusive, and binding on the finding of fact. And when the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it.

The Court in the *Herman* case (supra, at page 734) has this to say on the same point:

“His contention that he neither verbally took the oath, nor in writing signed the oath, is supported by the failure of the Government to suggest anything to the Court except the petitioner’s unsatisfactory performance of small, simple non-combative duties * * * which do not include any basic army training. If he had taken the oath, it would have been very easy to have proven. If he had signed the oath, equally quick and easy would have been that proof.”

The Court below appears to regard anything that Cox did under the compulsion of military authority after leaving the induction center as a waiver of “any irregularity in his induction.” If Cox did not take the oath, as he testified, then there was no induction at all and not just a mere irregularity. *Billings v. Truesdell*, supra. If he did take the oath, then he was still entitled to raise the question of the constitutional invalidity of the induction order. That was basic, and even an oath taken under the compulsion of such a void order and to exhaust his administrative remedies

as a condition precedent to his right to seek relief in the civil courts from that invalid order would not deprive him of the right to redress by habeas corpus at any time.

Assuming, *arguendo*, however, that this were not the rule, everything that Cox did after leaving the induction center at San Francisco was done under the compulsion of that invalid induction order. There was nothing voluntary about his movements at all. He was ordered by military authority to go from the Presidio in San Francisco to Monterey, and from there to Camp Rucker, and he was under no duty recognized by law to resist that asserted authority forcibly. (*United States ex rel. Filomio v. Powell*, *supra*, at page 186.)

All of this time Cox expected to get the hearing on his conscientious objector claim, which he had been promised all along the line, first by the secretary of his local draft board, who told him he would get a hearing in San Francisco; then in San Francisco, when he was told he would be given a hearing in Monterey; and then in Monterey, where he was told he would get such a hearing in Camp Rucker. (R. 30-33, 41-42, 102-103, 104.) At Camp Rucker he refused to take part in military training; and his letter to his wife of July 16, 1942 shows that he was still insisting that he was a conscientious objector, for he relates that he had "a showdown with the battery commander," and repeats a conversation with him wherein he stated that "any part of the service was helping to kill, whether you pulled a trigger or not". (Exhibit No. 4.)

Though this Court cannot see Cox, it may be pointed out that he is a very simple boy of limited education, much as was the registrant in *In re Herman*, 56 Fed. Supp. 733, 744, who was described by the Court there in words that fit Cox:

“He is simple and rather gentle in his refusals. He is courteous and essentially non-combative. He is not dogmatic nor assertive. He believes in working for a living. He does not believe in fighting. His reasoning is not logical, but he felt that so long as he was pressed into service he would perform that service so long as he did not take the oath or actually become a soldier, and so long as that service was not to fit him for a soldier but might be considered by himself as mere work. * * * He is entitled, though it tests somewhat our judicial patience, to * * * the full letter of the law. That full letter has been written by Congress and explained by the Supreme Court.”

The registrant in that case also refused to take the oath when he presented himself for induction, but was nevertheless placed in the Army and taken from California to Texas, when he, like Cox at Camp Rucker, “Half-heartedly participated in soldier activities.” (Page 734.) The Court, in granting the writ discharging the petitioner from military imprisonment, said at page 774:

“I seriously question whether, when one is forced by persuasion or by order or by Army social pressure, to engage in the simplicities that this man did, that he thereby takes himself out of the clear distinction that is made in the law. Until he is inducted he is liable to the civil authori-

ties. After he is inducted he is liable to the military authorities. Induction includes the taking of the oath."

In both the *Callan* and *Mayborn* cases, *supra*, there were specific waivers of the irregularities in the induction proceeding. Callan, the day after the oath was administered, appeared before an officer and promised that he would fight for his country and make a good soldier. Mayborn at camp told his superior that he had changed his mind and would undertake his duties as a soldier, and for more than two months thereafter he saluted his officer and performed all duties required of him as a soldier.

There is nothing of that kind here. When Cox was put into a combat unit (Battery C, 317th Field Artillery) at Camp Rucker, he immediately advised the captain in command of the battery that he was a conscientious objector, had refused to take the oath, and was not a soldier. His captain argued with him in vain, and then compelled him to carry two heavy 2x4 timbers nailed together in lieu of a gun, both on the parade ground and on a bivouac. When he rebelled, Cox was thrown into a stockade. (R. 33-34.)

When Cox was released, his captain again tried to argue his convictions out of him; and when Cox remained firm, told him that he would transfer him into a medical unit, but Cox insisted that he was opposed to all military service, both combatant and non-combatant (see his statement in his Selective Service file), and that he would be helping them kill Germans then just as much as if he pulled a trigger. (R. 34.)

Cox then waited only long enough to draw his first and last pay check so as to have funds to buy a rail ticket home, and he then returned to his family in San Jose, where he has been steadily employed under his own name and social security number until arrested by the F.B.I. and imprisoned in the guard-house at the Presidio of San Francisco on May 3, 1949. (R. 38, 43.)

Moreover, the lower Court's "constructive induction" theory was demolished by the Supreme Court in the *Billings* case, *supra*. Though both the District and Circuit Courts held that Billings was constructively inducted because he had been furnished meals and lodgings by the Army, went to camp, etc., the Supreme Court held that such induction was invalid.

In *Gibson v. United States*, 329 U.S. 338, 91 L. Ed. 344, a similar theory of "forfeiture by acquiescence" was rejected by the Supreme Court in these words:

"The government does not urge that Gibson waived his rights by submitting to 'induction' in the sense of voluntarily surrendering them; it is rather that he acted at his peril in taking steps beyond those required to complete the administrative remedial processes, even though he mistakenly thought them necessary for that purpose. The argument is essentially one of forfeiture rather than of waiver. The facts would sustain no intention to submit to induction or to surrender any rights."

How can it be seriously argued that a man with such a record of continuous resistance to military

service waived the constitutional invalidity of the induction order? It is clear from all the facts that even if this were in his power, he did not do so.

POINT V.

EVEN IF APPELLANT HAD BEEN LEGALLY INDUCTED INTO THE ARMY AND HAD IN FACT DESERTED, HIS PROSECUTION BY A MILITARY COURT IS NOW BARRED BY STATUTE OF LIMITATION.

The facts here are not in dispute. Cox left Camp Rucker on or about August 30, 1942, and was reported absent without leave on August 31st. He was continuously absent from the military jurisdiction until arrested and returned to the Presidio of San Francisco on May 3, 1949, nearly seven years later. The Army admittedly made no effort to find him during these seven years, though he lived with his family openly in San Jose, used his own name and social security number, and was steadily employed. (R. 43.) The lower Court took considerable pains to find out just why the Army was so dilatory, but there was no explanation; it simply did nothing whatever until April, 1949, when it referred the case to the F.B.I. (R. 173-74, 177.)

The Congress of the United States has seen fit to provide limitations for the prosecution of various criminal offenses, both in the Articles of War and the Federal Criminal Code. The Thirty-Ninth Article of War (10 U.S.C.A. Sec. 1510) places a two-year limitation on the prosecution of all military offenses except desertion in time of war and three other offenses,

and as to these—or any others not enumerated—it provides that “This Article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.” The bar created by existing law is equally clear, and is contained in Title 18, Section 3282 U.S.C.A., the Federal Criminal Code:

“No person shall be prosecuted or punished for any offense not capital unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.”

The only exception to the three-year limitation otherwise provided is contained in Section 3290 following, relating to “any person fleeing from justice”. The limitation of prosecution set forth above is so binding that not even an aggravated case of treason could be prosecuted after three years, until the Eighty-first Congress by special statute extended the time within which such a prosecution could be instituted. The appellee does not contend that Cox was a fugitive from justice, but says that there is no limitation for punishment of desertion in time of war. But the Thirty-Ninth Article of War does not so provide; it is silent on the specific question, and instead recognizes the limitations on prosecution provided by “other existing law”.

It is settled law that where a Congressional statute does not contain a specific limitation for the prosecution of any offense, the three-year limitation provided

in the Federal Criminal Code must prevail. *United States v. Krepper* (1946), 159 Fed. (2d) 958, 965.

The Articles of War are not made by the military; they are made and amended by the same Congress that has established the foregoing limitation of prosecution as the law of the land. There is no exception, either express or implied, of the offense of desertion from this bar. As stated by this very Circuit Court in *in re Zimmerman*, 30 Fed. 176, 179:

“If this offense can be taken out of the statute, so may any and all others, and the statute be wholly abrogated and rendered nugatory, by what seems to be a manifestly unjustifiable ruling of the Secretary of War and by courts-martial, if followed by them, acting in deference or subordination thereto.

“A question has arisen, whether desertion is a *continuing* offense, in such sense that the statute does not begin to run till the expiration of the term of the enlistment. A continuing civil or military obligation to serve till the expiration of the term of enlistment is *one* thing; and a continuing criminal offense, if such there can be, which is perfected and ripe for charges and trial at the moment it is ‘committed’, for the purpose of barring trial and punishment under the Statute of Limitations, is quite another.”

Here appellee cannot well claim that the alleged offense is not subject to the statute because of a ‘continuing nature’, since it has already tried and convicted the appellant by court-martial on the charge that he deserted on August 31, 1942. He committed

the alleged offense then, if at all, and he could have been taken and brought to trial at any time within three years thereafter. A similar question was raised in *United States v. Salberg*, 287 Fed. 208, 209, where the Court said:

“The offense charged, as well as the offense committed, is not a continuing offense. The indictment was not found until December 20, 1922. Prosecution of the offense was barred not later than June, 1920.”

See also *Warren v. United States*, 199 Fed. 753, 43 L.R.A. n.s. 278, for the analogous “continuing offense” of concealing bankrupt assets.

The district judge himself expressed his opinion that “There certainly should come a time when the person is free of the possibility of arrest, even if he is a deserter.” (R. 177.) The appellant’s argument that there is no such limitation was demolished by an early decision, *In re Davidson*, 4 Fed. 507, where the Court said:

“It is certainly a startling proposition that there is no limitation at all upon prosecution for the offense of desertion; that one who has once been a deserter is subject during the whole of his natural life to be brought before a military court and tried and punished for this offense, even in extreme old age. Yet this is seriously contended by the learned counsel for the respondent * * * The statute does not require, nor in my opinion admit of so strict and narrow a construction * * * As it is the only Article (of War) limiting the time of prosecution, the presumption

is very strong that it extends to every military offense; for, with the single exception of the crime of murder, the almost universal policy of the criminal law is to prescribe a term within which the offender shall be brought to trial. The language of this statute of limitations must be construed with reference to the use of similar language in other statutes of limitations * * * *Nor, as it seems to me, can the whole effect of this limitation be taken away on the theory that the desertion may be considered for some purposes to be a continuing offense. The offense was completed February 22, 1878, for the purposes of this Article, and indeed, in the writ that is alleged to be the time when the offense was committed for which the prisoner is now held.*" (Italics supplied.)

On the now wholly untenable ground that "a military prisoner cannot avail himself of habeas corpus", the Circuit Court reversed the *Davison* case, but it refused to pass on the issue so strongly presented by the District Court.

The sound reasons of public policy mentioned by the Court in the *Davison* case as requiring a limitation of time for the prosecution of criminal offenses is further emphasized in *United States v. Eliopoulos*, 45 Fed. Supp. 777:

"Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government, to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability."

The need for such protection is amply illustrated in the instant case, where by lapse of time and changes of residence appellant's wife testified that all of appellant's daily letters to her from the Army camps where he was detained, with the sole exception of one complete letter and the fragment of another, had been lost. Yet those letters detailed in a manner that cannot be provided by any other evidence the continuous daily resistance of Cox to his impressment into military service despite his conscientious objections to war.

But appellee contended below that even if appellant's prosecution be now barred by statute, that defense can only be raised in the military court. (R. 176.) Admittedly, if the prosecution be now barred, the military court has no jurisdiction to try appellant. That primary question of jurisdictional fact is reviewable in the civil courts. The great Justice Brewer of the United States Supreme Court answered appellee's contention completely in *Grimley v. United States*, 137 U.S. 147, 150, 11 S. Ct. 54, 34 L. Ed. 636:

“It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from sentence.”

Mr. Justice Brewer's decision in the *Grimley* case was recently approved by the Supreme Court in *Brown v. Hiatt*, 339 U.S. 103, 94 L. Ed. 493, 70 S. Ct. 495.

This very question of the right of Federal Courts to inquire into the claimed jurisdiction of a military

court was thoroughly examined by the Circuit Court of Appeals in *Vermehren v. Sirmeyer*, supra, at page 380:

“A court-martial is a tribunal of special and limited jurisdiction. Its judgments are open to collateral attack so far as questions relating to its jurisdiction are concerned. *McLaughry v. Deming*, 186 U.S. 49, 22 S. Ct. 186, 46 L. Ed. 1049; *Givens v. Zerbst*, 255 U.S. 11, 41 S. Ct. 227, 65 L. Ed. 475; *Collins v. McDonald*, 258 U.S. 416, 42 S. Ct. 326, 66 L. Ed. 692.

“The burden is upon the party asserting the validity of the judgment of the court-martial to prove the existence of the necessary jurisdictional facts. *Givens v. Zerbst*, supra, page 19.”

Not only did appellee fail at the hearing below to adduce any proof whatsoever as to the disputed jurisdiction of the military court in this respect, but in his return to the writ of habeas corpus (Transcript, p. 4) he admits, and is bound by that admission, “That on or about August 31, 1942, the petitioner herein, while stationed at Camp Rucker, Alabama, deserted from the Army of the United States * * *”

The prosecution of appellant was therefore barred by the statute of limitation contained in the Federal Criminal Code, Section 3282, as the “existing law” other than the Articles of War, on and after September 1, 1945.

CONCLUSION.

Since appellant was denied due process of law by his local board as well as by his appeal board, rendering the induction order a nullity; since he did not abandon his claim to be classified as a conscientious objector as provided by law, nor thereafter waive the invalidity of the order of induction; and since his prosecution on this seven-year old charge is barred by the statute of limitations, the writ should be sustained and appellant discharged and the order of the lower Court reversed.

Dated, San Francisco, California,
January 8, 1951.

Respectfully submitted,

VICTOR E. CAPPA,

Attorney for Appellant.

No. 12,565

IN THE

United States Court of Appeals
For the Ninth Circuit

MILTON H. COX,

Appellant,

VS.

LIEUTENANT GENERAL A. C. WEDE-
MEYER, Commanding Officer of the
Sixth Army, Presidio, San Fran-
cisco,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

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FILED

MAR 27 1951

PAUL F. O'BRIEN,

CLERK

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No. 12,565

IN THE

United States Court of Appeals
For the Ninth Circuit

MILTON H. COX,

Appellant,

VS.

LIEUTENANT GENERAL A. C. WEDE-
MEYER, Commanding Officer of the
Sixth Army, Presidio, San Fran-
cisco,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", dismissing petition for writ of habeas corpus and discharging writ of habeas corpus. (See Tr. 1-15, Vol. I.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below is conferred upon this Honorable Court by Title 28, U.S.C.A., Section 2253.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court below discharging the writ of habeas corpus and dismissing the petition for writ of habeas corpus. (See Tr. 1-15, Vol. I.)

Appellant, by habeas corpus, challenged the jurisdiction of an Army General Court Martial to retry him for the offense of desertion in time of war, his first conviction having been reversed by the reviewing authority on the ground that prejudicial hearsay testimony was received in evidence against him.

At page 3 of his opening brief appellant declares that the Court below in its memorandum opinion¹ made "a fair presentation of the basic facts of the case". With this appellee agrees, although appellee respectfully says that he cannot concur in the conclusion of the Court below with reference to the sincerity of the appellant in the light of appellant's misrepresentations made to his employer, in securing employment after his desertion from the army, that he was an honorably discharged veteran. Inasmuch as appellee has included in the appendix to his brief the memorandum opinion of the Court below, he incorporates here by reference these facts from the said memorandum opinion.

¹See appendix this brief.

CONTENTIONS OF APPELLANT.

Appellant contends in substance that:

(1) He never took the oath during the induction ceremonies, and accordingly he never became a soldier, and therefore is not subject to military jurisdiction.

(2) Appellant's order of induction was void because it was based upon the arbitrary actions of his local and appeal boards, and accordingly he never became a soldier and is not subject to military jurisdiction.

(3) Even if appellant was validly inducted and is subject to military jurisdiction, his prosecution is barred by the statute of limitations.

ARGUMENT.

Appellee begins his argument by reference to the familiar rule that the burden of proof in this proceeding is upon the appellant, a burden which he has completely failed to meet, *Walker v. Johnston*, 312 U.S. 275, as cited in *United States ex rel. Lawrence v. Commanding Officer of McCook Army Air Field, et al.*, 58 Fed. Supp. 933, 938, 939, and to the equally familiar rule that, "It must be assumed, in the absence of a contrary showing, that the officers charged with his induction took such steps for it as they were bounden to take under the Army regulations". *Miller v. Commanding Officer*, 57 Fed. Supp. 884, 887. See

also *United States v. Jones*, (CCA-9), 176 F. (2d) 278, wherein it was said, at page 282:

“* * *. At the same time, presumption of legality attaches to the act of a public officer. As Chief Justice Marshall put it in an old case, an act done by an officer authorized by law to perform it ‘carries with it prima facie evidence that it is within his power’ and ‘he who alleges that an officer intrusted with an important duty has violated his instructions must show it’. *Delassus v. United States*, 1835, 9 Peters 117, 134, 9 L. Ed. 71. And see, *United States v. Coe*, 1898, 170 U.S. 681, 696-697, 18 S. Ct. 745, 42 L. Ed. 1195; *Lamport Mfg. Supply Co. v. United States*, 1928, 65 Ct. Cl. 579, 610.”

I. THE ALLEGED FAILURE TO TAKE THE OATH.

The appellee does not concede that the oath is a prerequisite of induction. See *In re Louis Kruk* (D.C. N.D. Cal.), 62 Fed. Supp. 901, interpreting *Billings v. Truesdell*, 321 U.S. 542. There is no necessity, however, for appellee to discuss this proposition, inasmuch as the Court below concluded that the appellant had actually taken the oath. Said the Court below, in distinguishing the facts in our case at bar from the facts of the case as set forth in the opinion of this Honorable Court in *Lawrence v. Yost*, 157 F. (2d) 44, a decision upon which the appellant strongly relies:

“* * * In short, his testimony that he had not taken the oath was supported by persuasive documentary and other evidence.

In the case at bar the testimony of petitioner is not so supported. On the contrary, many circumstances compel the conclusion that his statement is incorrect.”

A reading of the rather lengthy opinion of the Court below indicates that it made a thorough and careful analysis of the facts and the law applicable to this phase of the case. Accordingly, the appellee therefore adopts *in toto* these findings of fact and conclusions of law made by the Court below and the authorities cited in support thereof as his argument against the contention made by the appellant with relation to his alleged failure to take the oath.

II. THE ALLEGED ARBITRARY ACTIONS OF THE LOCAL AND APPEAL BOARDS.

Appellant contends that in failing to classify him as a conscientious objector in Class 4 E (availability for work of national importance under civilian direction but not available for either combatant or non-combatant military service), or as a Minister of Religion in Class 4 D, (exemption from service of any kind, either military or civilian), his local and appeal boards acted arbitrarily and capriciously.

In *Estep v. United States*, 327 U.S. 114, 122, 123, the Supreme Court declared:

“* * *. The provision making the decisions of the local boards ‘final’ means to us that Congress chose not to give administrative action under this

Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

In its decision in the *Estep* case, the Supreme Court cited the case of *Goff v. United States*, 135 F. (2d) 610, 612. In this latter case, the United States Court of Appeals for the Fourth Circuit said:

"* * *. But as we said in the case of *Adrian Elwood Baxley v. United States*, 4 Cir., 134 F. 2d 998, this does not mean that the court in a criminal proceeding may review the action of the board. *That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right.* Nothing in the evidence offered in the court below tended to show anything of this sort. *Adrian Elwood Baxley v. United States*, supra; *United States v. Kauten*, 2 Cir., 133 F. 2d 703; *Seele v. United States*, 8 Cir., 133 F. 2d 1015; *Rase v. United States*, 6 Cir., 129 F. 2d 204; *Johnson v. United States*, 8 Cir., 126 F. 2d 242; *United States v. Pace*, D.C., 46 F. Supp. 316; *United States v. DiLorenzo*, D.C., 45 F. Supp. 590; *United States v. Newman*, D.C., 44 F. Supp. 817." (Emphasis supplied).

The Court below in its memorandum opinion, in exacting detail, considered the second contention advanced by the appellant that he had been denied due process under the Selective Service Act and, with the same persuasive reasoning which it had employed in disposing of the first allegation of the appellant, found this contention to be likewise without merit. Accordingly the appellee also adopts *in toto* these findings of fact and conclusions of law made by the Court below and the authorities cited in support thereof, together with the additional authorities heretofore cited by appellee herein, as his argument against the unsupported and unfounded allegation made by appellant that the Local Board and the Appeal Board had acted arbitrarily in classifying him in a classification other than Class 4 E or Class 4 D.

III. THE ALLEGED LOSS BY THE COURT-MARTIAL OF ITS JURISDICTION OVER THE APPELLANT UNDER THE STATUTE OF LIMITATIONS.

In its memorandum opinion the Court below had only this to say concerning the proposition advanced by the appellant that the court-martial had lost jurisdiction to try the appellant under the statute of limitations:

“With respect to petitioner’s contention that his prosecution is barred by the statute of limitations, I am compelled to hold according to my interpretation of the applicable statutes that there is no statute of limitations applicable to desertion in time of war.”

A reading of the 39th Article of War, Title 10 U.S.C.A. Section 1510 clearly indicates that there is no limitation upon prosecutions for desertion in time of war. This is so fundamental, that appellee feels that he does not have to answer appellant's unsupported and illogical arguments thereon. That we are still at war, so far as prosecutions are concerned, for the offense of desertion in time of war, may be seen by reference to Joint Resolution, July 25, 1947, Chapter 327, Section 3, 61 Stat. 451. Assuming, arguendo, that the statute of limitations is a bar against prosecution for the offense of desertion in time of war, it is a defense which must be raised before the military court, and is certainly not a defense to be entertained by a civil Court, particularly in a habeas corpus proceeding. See

In re White (C.C.Cal.), 17 Fed. 723;

In re Davison (C.C.N.Y.), 21 Fed. 618, 619;

In re Zimmerman (C.C.Cal.), 30 Fed. 176, 177;

In re Cadwallader (C.C.Mo.), 127 Fed. 881.

See also *Ex parte Benton* (D.C.N.D. Cal.), 63 Fed. Supp. 808, 809, 810, wherein the Court defines the limitations of a civil Court with reference to courts-martial.

SUMMARY.

To summarize—the Court below found against the appellant in his allegation that he had not taken the oath, thus obviating the necessity of a discussion as to whether or not the oath was a prerequisite of in-

duction at the particular time the appellant reported for induction in response to an order from his Local Draft Board. Similarly, the Court below found that there was no basis in fact for the classification of 4 D sought by the appellant, as it also found that the appellant had abandoned his claim for a classification of 4 E when he made his appeal to the Appeal Board from the classification of 1A-O (availability for non-combatant military service) accorded him by his Local Board. That there was substantial evidence to support these findings cannot be seriously questioned although appellant seeks unsuccessfully to do so. Two briefs have been filed on behalf of appellant, including an Amicus Curiae brief filed by the American Society of Friends. Both of these briefs are replete with authorities not in point, and which appellee feels under no obligation to discuss, particularly in light of the persuasive opinion of the Court below which is conclusive answer to each and every contention advanced by the appellant before it and before this Honorable Court. That the findings of the Court below, supported by substantial evidence, cannot be disturbed is a principle as clearly established as is the principle that the statute of limitations is not applicable to a charge of desertion in time of war, and the further principle that this defense of the statute of limitations cannot be raised by way of habeas corpus. Accordingly appellant, whose induction order was based on a valid classification was duly inducted into the Army of the United States, and thus became subject to military jurisdiction and liable to prosecution

by a general court-martial for the offense of desertion which he committed in time of war.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below, dismissing appellant's application for a writ of habeas corpus, is correct, and should be affirmed.

Dated, San Francisco, California,
March 23, 1951.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

[Title of Court and Cause.]

“MEMORANDUM OPINION

This action involves a petition for a writ of habeas corpus alleging that petitioner is unlawfully imprisoned under the color of authority of the respondent. Upon issuance of the writ and return thereto by the respondent, a hearing was held, at which time the following facts were determined:

1. On June 20, 1941, the petitioner, Milton Harold Cox, returned his Selective Service Questionnaire to the Local Draft Board No. 111, Santa Clara County, California, as required by the Selective Training and Service Act of 1940. In this questionnaire the petitioner indicated by appropriate notation that by reason of religious training and belief he was conscientiously opposed to participation in military service. At that time he made no claim to being a minister or student preparing for the ministry.

2. On June 25, 1941, the petitioner personally delivered to the local board a letter claiming that he was an ordained minister of religion for Jehovah's Witnesses, entitled to a IV-D classification, and requesting such classification. Apparently this letter with supporting document was lost or misplaced in the records of the local board.

3. On February 6, 1942 the Special Form for Conscientious Objectors—DSS Form 47—was sent by the local board to the petitioner.

4. On February 9, 1942 the petitioner wrote to the local board enclosing copies of his letters of June 1941, stating that they were the basis for his requested classification as a minister of the gospel, and that he had been advised that the local board had no record of these letters.

5. On February 15, 1942 the Chairman of the local board Will B. Weston made a written memorandum which was placed in petitioner's selective service file to the effect that he had personally investigated petitioner's objections to service, found them to be sincere, and recommended his classification as IV-E (conscientious objector). On February 19, 1942 the petitioner filed with the local board the above mentioned Form 47 Special Form for Conscientious Objectors, in which he reiterated his claim for exemption as a conscientious objector and explained in detail the basis for the claim.

6. Nevertheless, the local board classified the petitioner I-A-O. Therefore, on March 16, 1942 petitioner appealed from this I-A-O classification and requested that the Appeal Board of Santa Clara County place him in classification of IV-D, minister of the gospel. This appeal is of importance in this case, and therefore is quoted in full. It reads as follows:

“Gentlemen:

“I hereby appeal from the classification 1A-O given me by Santa Clara County Draft Board No. 111 and request that I be placed in class 4-D by reason of the fact that I am a minister of the gospel.

“I am a member of Jehovah’s Witnesses and we are taught and instructed to preach the word of God direct from the Bible. Membership in the organization makes each member a minister of the gospel with the duty to preach the word of God.

“I have not attended any religious school but have studied under the direction of the leaders in Jehovah’s Witnesses.

“I am employed by Pacific Manufacturing Company during the day but hand out booklets and literature to people who are interested and play phonograph records to people who are interested and then return to talk with them upon request. I contend that these facts make me a minister and respectfully request that I be placed in class 4-D.

Respectfully submitted,
MILTON HAROLD COX.” (Sgd.)

On April 10, 1942 the Appeal Board returned the petitioner’s file to the local board, affirming the I-A-O classification on the ground that the petitioner did not appeal as a conscientious objector “but *only* because he claims to be a minister of religion”, which latter claim could not be upheld. The letter denying the appeal reads as follows:

“Dear Sirs:

“We are sending you herewith the questionnaire and file of Milton Harold Cox, No. 4685.

“The action of your board in placing the registrant in Class 1-A-O has been affirmed.

“The registrant does not appeal as a conscientious objector, but only because he claims to be a

minister of religion. He says in his appeal that every member of Jehovah's Witnesses is a minister of the gospel. This would seem to leave no one to form the body of the church or congregation and this board is of the opinion that registrant does not qualify either as an ordained or as a regular minister of the gospel.

Very truly yours,

BOARD OF APPEAL NO. 9

CCC:GOC By C. C. Coolidge (Sdg.)

Inclosure

Chairman"

7. Upon advice from the State Director of Selective Service that the petitioner's name was not listed on the Certified List of Jehovah's Witnesses who were entitled to consideration for a IV-D classification, the local board on May 8, 1942 notified the petitioner that his I-A-O classification would stand.

8. On June 12, 1942 the petitioner reported for induction at the induction station in San Francisco. He claims that he did not take the induction oath at this time or at any time, but that he continued on to the Presidio at Monterey with his draft group on the representation that he would there get a further hearing on his classification.

9. While at Monterey petitioner allegedly signed a statement purportedly abandoning his claim as a conscientious objector. The petitioner claims he never signed such a statement. The validity of his signature to this document was never proved. There is no foundation for the admission of this alleged statement in evidence, therefore, it is ordered stricken from the record, and this Court disregards it.

10. Petitioner was then sent to a basic training camp in Alabama. He refused to take part in military training and at the first opportunity boarded a train and returned to his home in San Jose, where he has resided openly ever since.

Petitioner obtained a job with one of his former employers, thereafter changed his employment from time to time, but at all times remained in San Jose. He made absolutely no attempt to conceal his identity, or his address, or residence, or whereabouts. He was arrested by agents of the Federal Bureau of Investigation about May, 1949, almost seven years after he had left Camp Rucker in Alabama. During this period he has supported his wife, and so far as the record shows has been a law-abiding industrious citizen.

The Army did not turn over his name to the Federal Bureau of Investigation until April, 1949, and its agents had no trouble whatever in finding and apprehending him. They just went to San Jose, located him and arrested him. In this connection it might be mentioned that after his return to San Jose in discussing his military status with his employers, or prospective employers, he stated that he had received a medical discharge from the Army.

After his arrest he was turned over to the Army authorities, and tried by a court martial for desertion in time of war, found guilty, and sentenced to five years at hard labor. This conviction was set aside and a retrial ordered. Pending this retrial he brought these proceedings.

Petitioner's contentions here consist of the following:

1. That his order of induction was void because there was no substantial basis in his selective service record for the classification order made in his case;
2. That he never took the oath during the induction ceremonies and accordingly never became a soldier; and
3. That his prosecution by court martial is barred by the statute of limitations.

Regarding his first contention we agree with the petitioner that while this Court cannot review the decision of a local board or an appellate board in a proceeding of this kind, it has the power in a habeas corpus proceeding to determine whether the original classification and induction order was arbitrary, or capricious, or the result of the denial of a full and fair hearing. *U. S. ex rel. Lawrence v. Commanding Officer*, 58 F. Supp. 933, and cases therein cited.

In determining this question this Court is limited to the record in the petitioner's file. *U. S. ex rel. Hull v. Stalter*, 151 F.(2d) 633; *Miller v. U. S.*, 169 F. (2d) 865, 868.

If the record discloses that there was no substantial basis therein for the classification order made therein, this Court has the jurisdiction to declare the order of induction void. If we were dealing in this case with the petitioner's selective service record up to his classification by his local board I would feel

that the contention of petitioner is correct, and that there was no basis for the classification order that was made. In other words, the petitioner's selective service file up to the time of his appeal from the order giving him the classification of 1-A-O showed no basis for giving him any other classification than that claimed by him, to wit, conscientious objector. The difficulty with petitioner's contention in this respect, however, develops from an examination of what occurred in connection with his appeal from the first order of his local board. It has been pointed out in previous decisions that before a draftee may attack the validity of an induction order he must exhaust his administrative remedies, that is, he must take the appeals provided for either by the statute or regulations. In this case as heretofore pointed out, the petitioner took an appeal from the classification given him by the local board on the ground not that he was a conscientious objector, but that he was a minister of the gospel. His claim that he was a minister of the gospel has no basis in fact, and is not supported in any respect by his selective service file. Accordingly the appeal board's order rejecting his appeal on this ground may not be attacked.

Petitioner contends that since he took an appeal from the local board's classification, even though his specified ground for such appeal was that he should have been classified as a minister, that the appeal board should have examined his Selective Service file and classified him as a conscientious objector, which

clearly the local board should have done. Petitioner bases this contention upon the cases which hold that the appeal board is not bound by the local board's classification, and it should review the case *de novo*, and its classification supersedes the action of the local board.

United States v. Pitt, 144 Fed. (2d) 168;

Reel v. Badt, 53 F. Supp. 906, 907;

Cramer v. France, 148 F. (2d) 801.

Petitioner argues that it follows from this premise that the appeal board should have followed the procedure indicated by Section 5(g) of the Selective Training and Service Act of 1940 (50 USCA 305(g)) and paragraph 627.25 of the Selective Service Regulations, and that it did not follow this procedure, and did not give the petitioner the hearing and investigation required thereby, and therefore it denied him the due process of the law.

The difficulty with this argument is that it ignores the fact that the appeal taken by petitioner was limited solely to the claim that he should have been classified as a minister. By thus limiting his appeal he impliedly, if not expressly, abandoned his claim to be classified as a conscientious objector. Said section 627.25 of the Regulations says in part:

“If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector * * *”

In this case petitioner's appeal did not involve the question whether his claim as a conscientious objector

should be sustained. Moreover, Section 5(g) of the Act, which said section 627.25 of the Regulations was meant to implement says:

“* * * Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in Section 10(a)(2). *Upon the filing of such appeal with the appeal board*, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof.”

In this action petitioner did not file with the appeal board *such an appeal*, that is, an appeal from the local board's refusal to classify him as a conscientious objector.

Since petitioner's appeal was limited to the failure of the local board to classify him as a minister, he cannot now claim that the appeal board should have gone into the question of his classification as a conscientious objector. To require an appeal board when an appeal is taken on one particular ground to examine the entire file and seek out any other ground it could find for rejecting the local board's classification would be, it seems to me, placing a burden upon such a board never intended by the Act or regulations, and entirely inconsistent with the national exigencies which said Act and regulations were intended to meet. I feel that in the case of an appeal such as was taken in this case the appeal board was justified in assuming

and had the right to assume that all other grounds of appeal had been abandoned.

This view is supported by *United States v. Flint*, 54 Fed. Supp. 889, affirmed in *Altieri v. Flint*, 142 F. (2d) 62, where it is suggested that an appeal to an appeal board solely upon one ground may be considered an abandonment of any other ground.

For the foregoing reasons I feel that petitioner's claim that he was inducted without due process cannot be sustained.

Regarding petitioner's second contention he never took the oath, and therefore never was inducted into the Army, under the circumstances of this case I cannot find this claim to be correct. The burden of proof to sustain this contention by a preponderance of the evidence is upon the petitioner. There is no direct evidence he did not take the oath, except that of the petitioner himself.

He testifies he appeared for induction in San Francisco on June 12, 1942, together with other draftees from Santa Clara County; that he told an officer there that he was a conscientious objector, and was told by this officer, whose name he did not know, to go ahead with his physical examination and that he would be given a hearing in Monterey on his claim as a conscientious objector. He then took the physical examination along with said other draftees. He says that then they were all taken into a room and stood in rows, that he was on the left end about three rows

from the front; that an oath was read to them; that he never raised his hand, but turned his back, and then or thereafter told the said officer that he did not take the oath, and that he was a conscientious objector. The only attempted corroboration of his statement that he did not take the oath is the statement of his wife that he telephoned her from Monterey that he had not taken the oath, and of two of his associate Jehovah's Witnesses to the effect he met one Wright in April, 1943, nine months after he left Camp Rucker and told him he had not taken the oath, and one Farmer whom he met shortly after his return to San Jose to whom says Farmer he made the same remark.

There is no record in his Selective Service file or in his files and letters, or elsewhere, as far as the evidence is concerned that he ever claimed that he had not taken the oath, except the testimony above-mentioned. Petitioner contends that his exhibit 4, which was a letter he wrote to his wife from Camp Rucker, Alabama, is a written record that he did not take the oath, but this document says nothing about such refusal or failure.

Petitioner's situation is entirely different from that of the draftee in *Lawrence v. Yost*, 157 F. (2d) 44. There the draftee testified that when the oath was administered to a group of inductees he failed and refused to take it. His statement was corroborated by his acts preceding and immediately subsequent to his attempted induction. He was outspoken he would not

take the oath, and had not taken it. Immediately after the induction service he told the officers that he would not report to the Army and that he had not taken the oath and he did not report to the Army. He returned to his home and reported to the Clerk of his local board that he had not taken the oath. The Clerk made a written note to that effect in his file. Sometime after he made a full written report to the Federal Bureau of Investigation to the same effect. In short, his testimony that he had not taken the oath was supported by persuasive documentary and other evidence.

In the case at bar the testimony of petitioner is not so supported. On the contrary many circumstances compel the conclusion that his statement is incorrect. He failed to tell his local board that he had not taken the oath. He made no written statement to that effect to any official in the Army, or connected with the local board. Instead of refusing to report to the Army as in the *Yost* case he went voluntarily from the Presidio in San Francisco to Monterey, and from there to Camp Rucker, Alabama, he designated his wife as his beneficiary, he wore the uniform of the Army, accepted a pay check and other Army benefits, including free mailing privileges accorded a soldier. In writing to his wife from Alabama he did not tell her he had not taken the oath. When he applied for positions after his return to San Jose the excuse he gave for not being in the Army was to the effect that he had received a medical discharge, and when he was apprehended and arrested, and at his first court martial, he never made any claim that he had not taken

he oath. These and other circumstances compel me to find that he has not sustained the burden of proving he was not properly inducted. Moreover, it might be said also that these circumstances show that his conduct after leaving the induction center amounted to a waiver of any irregularity in his induction.

Mayborn v. Heflebower, 145 F. (2d) 864;

Sanborn v. Callan, 148 F. (2d) 376.

With respect to petitioner's contention that his prosecution is barred by the statute of limitations, I am compelled to hold according to my interpretation of the applicable statutes that there is no statute of limitations applicable to desertion in time of war.

CONCLUSION

For the foregoing reasons I am constrained to discharge the writ heretofore issued. I do so with regret, however, because I feel that in view of the fact petitioner was a sincere conscientious objector according to the finding of the chairman of his own local board he should have been classified as such. I believe also that as he has been a law abiding industrious citizen since he left the Army in August, 1942, it is deplorable that he should be taken from his home and work and prosecuted for his desertion at this late date, particularly as he made no effort at any time to conceal his existence or whereabouts. I also feel that in view of all the circumstances of this case that the original sentence meted out to him was excessive, unreasonable and inhuman, and that his case should be treated with the utmost leniency. If it were the province of this

Court to mete out the punishment, if any, in this case, the sentence imposed would be the slightest legally possible. Having no further jurisdiction over this matter, however, I can only express the hope that any military tribunal or executive official exercising jurisdiction over the petitioner in the future will give consideration to the views expressed herein.

Wherefore, the Petition for Writ of Habeas Corpus will be dismissed, the Writ of Habeas Corpus heretofore issued will be discharged, and the Petitioner remanded to the custody of the Respondent; but pending an appeal from the decision of this Court he shall be enlarged upon recognizance with surety in the sum of \$500.00 for appearance to answer the judgment of the appellate court.

Dated: April 27, 1950.

Herbert W. Erskine,
United States District Judge."

No. 12566.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERALD GLENN BOYDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

ERNEST A. TOLIN,

United States Attorney,

NORMAN W. NEUKOM,

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No. 12566.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERALD GLENN BOYDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

The United States District Court for the Southern District of California had jurisdiction of Appellant and the subject matter. This Court has jurisdiction of the appeal.

The offense charged was triable by the District Court under authority of Title 18, United States Code, Section 2312, wherein the offense was defined, and of Title 28, United States Code, Section 41, Subdivision 2, which confers jurisdiction to try the case upon the District Court. This Court has jurisdiction of the appeal under the provisions of Title 28, United States Code, Section 225(a) and (d), which treat of the jurisdiction of Courts of Appeal.

Statement of Case.

The record in this case is devoid of any part of the evidence or proceedings at the trial or hearing which was stenographically reported.

The record, accordingly, is inadequate for any review of the evidence or proceedings in the trial court not included in the Clerk's Transcript.

The record shows that appellant was indicted January 25, 1950, under 18 U. S. C. 2312 for transporting a stolen car in foreign commerce [T. R. 2]; arraigned January 31st, 1950, at which time the Court appointed counsel for appellant who thereupon entered a plea of "Not Guilty" and the case was set for jury trial on March 14, 1950 [T. R. 15-16].

Upon the trial of the case no peremptory challenge was exercised [T. R. 18] in the selection of the jury which returned a verdict of guilty [T. R. 22], and by stipulation the exhibits in the case were withdrawn [T. R. 21], and written Judgment and Commitment were filed March 17, 1950 [T. R. 23-24].

One so-called "Notice of Appeal" was filed on March 27, 1950 [T. R. 25], and the other on May 8, 1950 [T. R. 32].

Appellant filed his "Defendant's Motion to Vacate and Set Aside Judgment and Sentence" on April 24, 1950 [T. R. 27-30], and the Court on the same day considered and denied said Motion [T. R. 31].

On May 8, 1950, appellant filed document entitled 'Paupers Affidavit' [T. R. 33], and on the same day the Court ordered that appellant be permitted to appeal without prepayment of the usual filing and certification fees without denied, without prejudice to application to this Court, appellant's request for a copy of the transcript at Government expense [T. R. 34].

I.

There Is No Evidence of Illegal Arrest.

The record before this Court does not afford any basis for a consideration on the merits of the legality of appellant's arrest.

However, appellant's "Argument of the Case" discloses that appellant was arrested by the Mexican Authority, in Tiajuana, Mexico, deported from Mexico and delivered to San Diego Authorities who placed appellant in the San Diego jail after appellant admitted he had stolen the automobile (App. Br. p. 13).

The illegal arrest of which appellant complains was effected, according to appellant, by a San Diego "City" police officer [T. R. 25, line 17]. Thus it would inferentially appear that no Federal authorities were involved in any illegal arrest of appellant.

II.

Petition for Habeas Corpus Insufficient.

On its face, appellant's purported "Petition for Writ of Habeas Corpus" is wholly insufficient.

III.

Criticism of Defense Counsel and Jury Frivolous.

There is no evidence in any record before this Court to the effect that "Defense Counsel" was either incompetent or inexperienced.

There is nothing in the Record to indicate appellant's dissatisfaction with the trial jury or any impropriety in its selection. No peremptory challenge was exercised [T. R. 18].

IV.

Evidence Proper on Issue of Intent.

There is nothing in the record before this Court to indicate any impropriety in the admission of any evidence.

Evidence of similar and related offenses may be properly introduced into evidence as tending to show a consistent pattern of conduct highly relevant to the issue of intent.

Nye & Nissen v. U. S., 330 U. S. 613, 618, affirming this Court's opinion in 168 F. 2d 846.

V.

Admissions Properly in Evidence.

There is nothing in the record to show what, if any, confession or admission of appellant was introduced into evidence.

Further, appellant misinterprets the law and the significance of the quotation from *United States v. Haupt*, 136 F. 2d 661, 671 [13] (1943, Cal. App. 7).

Appellant also misinterprets the other cases cited in his brief.

VI.

Appellant Found Guilty of Crime Charged.

There is nothing in the record to indicate that appellant was found guilty of anything other than the charge in the one count indictment that

“On or about January 7, 1950, defendants Gerald Glenn Boyden and George Louis Thompson did transport and cause to be transported a certain stolen motor vehicle, namely: a 1947 Dodge sedan, motor number D24320635, from San Diego County, California, with the Southern Division of the Southern District of California, to Tiajuana, Baja California, Mexico; and the defendants then knew the motor vehicle to have been stolen.”

VII.

Court Involved in No Conspiracy.

There is nothing in the record to indicate that there was any conspiracy or that the Court participated in any conspiracy.

VIII.

Notice of Appeal Was Filed.

The record shows that appellant's Notice of Appeal was filed. Thus, appellant, in this connection, has nothing of which to complain to this Court.

IX.

Motion to Vacate Judgment and Sentence Properly Denied.

Appellant complains that his prayer to set aside sentence and judgment "should have been answered."

The record shows the prayer was "answered." It was denied on April 24, 1950 [T. R. p. 31].

Appellant's "Argument of the Case" demonstrates the fact that the issue was for the jury, which found against appellant on testimony of substantial character and weight.

Conclusion.

It is respectfully submitted that there is no merit in appellant's position, that the appeal is frivolous, and judgment should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney,

NORMAN W. NEUKOM,

Assistant U. S. Attorney,

Chief of Criminal Division,

WILLIAM L. BAUGH,

Assistant U. S. Attorney,

Attorneys for Appellee.

No. 12567

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED QUON, *et al.*,

Appellants,

vs.

NIAGARA FIRE INSURANCE COMPANY OF NEW YORK, *et al.*,

Appellees.

APPELLEES' BRIEF.

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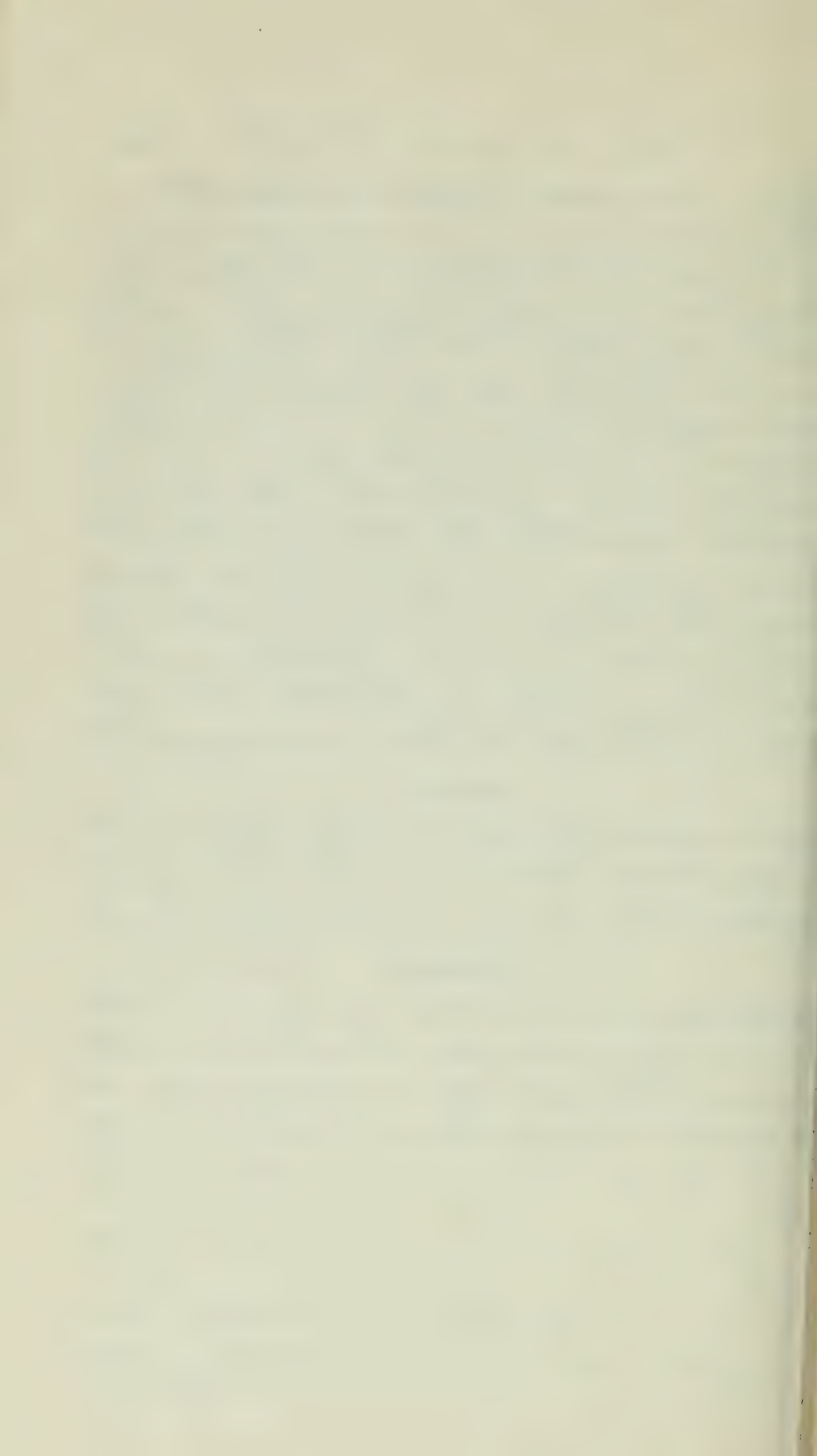
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No. 12567

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED QUON, *et al.*,

Appellants,

vs.

NIAGARA FIRE INSURANCE COMPANY OF NEW YORK, *et al.*

Appellees.

APPELLEES' BRIEF.

Appellees' Statement of the Case.

Appellants brought this action against Appellees by filing on March 1, 1948, their complaint in the Superior Court of the State of California, in and for the County of Imperial. Appellees removed, for diversity of citizenship, the action to the United States District Court, Southern District of California, and filed answer therein.

Appellants, in their complaint, sued Appellees upon seven separate policies of fire insurance issued by the several Appellees and alleged a loss by fire occurring to the property described in the said policies, which loss by fire occurred on May 27, 1946.

Appellees' answer put in issue the material allegations of the complaint and pleaded, *inter alia*, that Plaintiffs had not commenced their action within the time provided for in the California statutory fire insurance policy, and this was the defense upon which the Court ordered judgment for Appellees.

Appellants, conceding their failure to comply with the requirements of the statutory policy by commencing their action within fifteen months next after the fire, alleged certain facts which they claimed estopped Appellees from relying upon this statutory limitation. The District Court found against Appellants on these allegations of estoppel.

Statement of Facts.

The undisputed facts, and as found by the trial court, show the following:

All of the policies of insurance sued upon by Appellants, with the exception of one, were countersigned and delivered to Appellants by one Herbert Loudermilk, local agent at El Centro, California; one policy of Appellee, Niagara Fire Insurance Company, was countersigned and delivered to Appellant Quon by Carey Brothers, local agents at Brawley, California.

On the day following the fire Appellant Quon was notified by these two local agents that one Carl Quigg, an independent adjuster, had been appointed by all of the Appellee companies to act as their sole adjusting representative with reference to their insurance policies and the loss by fire. [Tr. Vol. I, p. 14, lines 14-19; p. 60,

lines 22-26.] The second day following the fire, Mr. Quigg met Appellant, Quon, and, after review of the premises and some preliminary discussion, was advised by Quon that he had employed as counsel one S. P. Williams, a practicing attorney in El Centro, California. Quon notified Quigg that all negotiations with reference to the insurance and the fire were thereafter to be had with the said S. P. Williams. Within three days after the fire, the Appellants and their attorney were advised and knew that said Carl Quigg was the sole adjusting representative of the Appellees to act in all matters and things in relation to the loss by fire and the contracts of insurance. [Tr. Vol. I, p. 61, lines 1-12.] After the employment of Mr. Williams as his counsel, Mr. Quon did not talk with Mr. Quigg at any time. [Tr. Vol. II, p. 81, line 25, to p. 82, line 3.]

Following the employment of Mr. Williams as Appellants' attorney, Mr. Quigg, upon the claim of the Appellants that the policies of insurance had been destroyed in the fire, furnished Mr. Williams with copies of the policies, that is, the daily reports showing all of the policy except the statutory provisions. Mr. Williams, on July 26, 1946, served upon Mr. Quigg, as the adjusting representative of the Defendants, preliminary Proofs of Loss, and, Mr. Quigg objecting to the forms of these Proofs, Mr. Williams, as Appellants' attorney, served on Mr. Quigg on August 9, amended Proofs of Loss, and on August 30, 1946, Mr. Quigg rejected these Proofs of Loss in writing and notified Appellants, through their attorney, that

he disagreed with the loss claimed in said preliminary Proofs of Loss and did not admit any loss, and further advised in said letters that the Defendants, and each of them, did not admit or deny liability under the policies, and that the Defendants, and each of them, *did not waive and should not be deemed to have waived any of the terms or conditions of the policies, or of any of them, or of any forfeiture thereof but the same were specifically reserved.* [Tr. Vol. I, p. 61, line 14, to p. 62, line 12; Pltfs. Exs. 1D, 2D, *et al.*] Following the letter of August 30, 1946, Mr. Quigg received no response thereto, and neither Mr. Quon nor Mr. Williams ever further communicated with him, Quigg, until sometime in November of 1947, when Quon telephoned Mr. Quigg in San Diego and was advised that the companies were not going to pay. [Tr. Vol. II, p. 142, lines 14-26; p. 65, lines 16-26.] Within a few days thereafter, *i. e.*, about the middle of November, 1947, Appellants employed an attorney, Mr. Clarence Smith, of El Centro, to handle the matter but no action was commenced until the present action was commenced on March 1, 1948.

Argument.

Appellants' whole case on this appeal, as indicated by their Specification of Errors, is an attack upon the trial court's Findings of Fact and the conclusions therefrom, yet nowhere do Appellants give this Court the entire evidence on any fact, nor do they point out where such isolated bits of testimony as they quote was destroyed by cross-examination or subsequent admissions, or impeached, nor do they make any attempt to aid the Court by a complete review of the evidence on any point, or to state clearly their grounds on any point, but apparently are content to make a sort of a jury argument without reference to the facts.

The foregoing statement of facts of Appellees is a literal statement of all the material evidence and all of the transactions had by or with any authorized persons, either by Appellants or Appellees.

Appellants' method of approach makes it necessary for Appellees to discuss incompetent testimony that was finally rejected by the Court, to discuss evidence upon which the trial court made findings adverse to Appellants because of contradictions, explanations and impeachment or from which the trial court, within its province as a trier of fact, drew conclusions of fact adverse to Appellants.

Before discussing the evidence, however, we believe that in the interest of a logical approach the foundation upon which the trial court rendered its judgment, and the law applicable, should be stated.

Each of the policies sued on contained the following provision made mandatory by the Code (Cal. Ins. Code, Secs. 2070-2071):

“No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire.”

The fire commenced on the 27th day of May, 1946, but Appellants did not commence any suit or action upon the policies until March 1, 1948, over twenty-one (21) months after the commencement of the fire.

There can be no question of the validity and enforceability of this provision, not only because it is a mandatory statutory provision, but also because the courts have unanimously upheld its validity. Indeed, Appellants recognize the validity of the clause and its enforceability by alleging in their complaint that they have performed and complied with all the terms and provisions contained in said policies on their part to be kept, performed, and complied with excepting the institution of action within fifteen months from the commencement of the fire, as above stated.” [Tr. Vol. I, p. 23, lines 12-16.]

Since it is apparent that Plaintiffs have not and cannot attack the validity of the clause, we are citing but a few of the many cases.

Tebbetts v. F & C Co., 155 Cal. 137, 99 Pac. 501;
Harlow v. American Equitable Ins. Co., 87 Cal. App. 28, 261 Pac. 499;

Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. 2d 748, 117 P. 2d 669;

Genuser v. Ocean Accident & Guaranty Corp.,
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Olds, etc. v. General Accident F & L Assn., 67 Cal.
App. 2d 813, 155 P. 2d 676;

Gifford v. Travelers Protective Assn., 153 F. 2d
209 (9th Cir., Jan. 26, 1946).

The Appellants knew the policies were statutory policies [Tr. Vol. I, p. 15, lines 10-15] and knew the provision requiring suit to be brought within fifteen months after the fire, and are conclusively presumed to know, because not only are they presumed to know the provisions of the instrument upon which they sue and by suing are conclusively presumed to have contracted with reference to it (*Hill v. London Assurance Corp.*, 12 N. Y. Supp. 86), but also because the policy is a statutory form and they must conclusively be presumed to have entered into it with reference to the statutory provisions.

See:

Harlow v. American Equitable Ins. Co., 87 Cal.
App. 28, 261 Pac. 499;

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307,
197 Pac. 99.

Appellants' Attempt to Invoke a Waiver or Estoppel Against Appellees.

Appellants, recognizing that they, although suing upon written instruments, have not brought themselves within the terms of the instrument sued upon, have attempted without any evidence whatsoever to invoke a waiver or an estoppel against Appellees to avoid the effect of the above quoted policy provision. While Appellees are willing to concede that, under proper circumstances, a con-

tractual or even a statutory right may be waived or a party be estopped to rely upon it, they are certain beyond a doubt that in this case there is absolutely no waiver of the above provision shown or no facts upon which an estoppel against Appellees can be found to prevent them from relying upon this plain statutory provision.

Before a discussion of the facts, we believe it desirable to examine the fundamental principles of waiver and estoppel and to quote the settled rule regarding the necessary evidence from which either waiver or estoppel can be found.

In this case there is absolutely no evidence of an express waiver by the Appellees of the provision of the policies requiring the suit to be brought within fifteen months after the fire and the trial court so found. [Tr. Vol. I, p. 64, lines 10-14.] On the contrary, the undisputed evidence is that the Appellees refused to waive this or any other of the terms or conditions of the policies and on August 30, 1946, in writing by several letters relating to each of the policies, notified the Appellants, through their attorney, that they: "shall not be deemed to have waived any of the terms or conditions of said policy of insurance, or of any forfeiture thereof, but the same are hereby specifically reserved." [Pltfs. Ex. 1D, *et al.*]

A "waiver" has been defined as an intentional relinquishment of a known right, and here in this case there was not only no relinquishment of the right, but an insistence in writing upon a reliance thereon.

As stated in *Reynolds v. Detroit Fidelity & Surety Co.*, 19 F. 2d 110:

"The burden of proof is upon the party claiming a waiver to prove it. * * * In the absence of conduct creating an estoppel, a waiver must be supported

by an agreement founded upon a valuable consideration. There can be no waiver unless so intended by one party and so understood by the other, but when a party has so acted as to mislead the other he is estopped thereby. 40 Cyc. 261; *Hasler vs. West India S. S. Co.* (C. C. A. 2), 212 F. 862, 867.”

Again, in the case of *Dahrooge v. Rochester-German Ins. Co.*, 143 N. W. 608, the Court said:

“It is further contended in plaintiffs’ behalf that the time for bringing action was extended by waiver, or estoppel, arising from negotiations for settlement, extending from the date of the fire in October until the following July, during which time defendant’s adjuster gave repeated assurances that the loss would be paid. It has been said that a waiver must arise either by express agreement, a new promise to pay, a part payment, or a failure to plead. A waiver is a voluntary relinquishment of a known right. Estoppel is based on some misleading conduct or language of one person, which, being relied on, operates to the prejudice of another, and is applied to the wrongdoer by the court in denial of some right, which otherwise might exist, to prevent a fraud. The claim of plaintiffs in this case seems rather to suggest an estoppel, though in insurance cases the terms are freely used interchangeably, and it is sometimes expressed as waiver by estoppel.”

Again, in the case of *McDannels v. General Insurance Co.*, 1 Cal. App. 2d 454, 460, 35 P. 2d 394, the Court said:

“To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege

—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. (25 Cal. Jur. 926-928.)”

Since there is absolutely no evidence of any express waiver, we will treat Appellants’ claim of waiver as another name for estoppel, as the courts have frequently done, and cite a few of the many cases defining the express nature of an estoppel and the elements necessary to establish the same before discussing the alleged facts upon which Appellants base their claim.

As said by the United States Supreme Court in *Globe Mutual Ins. Co. v. Wolff*, 5 Otto 326, 95 U. S. 333, 24 L. Ed. 387:

“The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the companies sought to be estopped from denying the waiver claimed should be apprised of all the facts: of those which create the forfeiture, and of those which will necessarily influence its judgment on consenting to waive it.”

The Supreme Court of California in *Wheaton v. Insurance Co.*, 76 Cal. 415 (18 Pac. 758), at page 429, said:

“The waiver spoken of in the instruction is another term for estoppel. There can be no estoppel where the facts are not known, as no one can be presumed to have waived that the existence of which he has not known. (*Finley vs. Lycoming Co.*, 30 Pa. St. 311; 72 Am. Dec. 705; *Forbes vs. Agarwam Co.*, 9 Cush. 470; *Allen vs. Vermont Co.*, 12 Vt. 366; *Biddle Boggs vs. Merced Co.*, 14 Cal. 279.) And the facts proved must be such that an estoppel is clearly deductible from them. *Estoppels are not favored.* (*Franklin Co. vs. Merida*, 35 Cal. 558.)” (Italics ours.)

“The representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. *Certainty* is essential to all estoppels. (Bigelow on Estoppel, 559.)”

And, again, on page 431, said:

“In cases like the present it must appear that the insured was misled to his prejudice; and where no act has been done, or left undone by the insured, in reliance on the act or non-action of the insurer, there can be no estoppel. (May on Insurance, Sec. 507; *McCormick vs. Springfield Co.*, *supra.*) The acts or declaration must have influenced the conduct of the other party to his injury. (*Boggs vs. Merced Company*, *supra.*) An estoppel can never arise by implication alone, except by some conduct which induces action in reliance upon it to an extent which renders it fraud to recede from what the party has been induced to expect. (*Security Co. vs. Fay*, 22 Mich. 467; 7 Am. Rep. 670.) An equitable estoppel is only called into existence for the prevention of wrong and redress of injury. There must be some

element of wrong in the action of the party creating it. He must know, or have sufficient reason to believe, that another party will place himself in a different position, or subject himself to additional injury in consequence of the action or representation.”

In *Hartford Fire Ins. Co. v. Small*, 66 Fed. 490, the Court said:

“On a question of a waiver of an express condition of a written contract or a consent that such condition need not be complied with after a breach of the condition has been made by the insured, there must be evidence that the subject-matter of the waiver and consent was in the minds of the parties at the time, and that it was consciously and purposely done by the minds of the parties coming together upon the definite proposition.”

And in *Bennecke v. Insurance Company*, 105 U. S. 355, 26 L. Ed. 990, the Court said:

“A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but whether it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists, and one of the parties set up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding.”

The elements of estoppel are clearly set forth in the case of *Rice v. California-Western States Life Insurance Co.*, 21 Cal. App. 2d 660, page 668, 70 P. 2d 516, as follows:

“The four elements necessary to constitute equitable estoppel are thus set forth in *Jones vs. Coulter*, 75 Cal. App. 540 (243 Pac. 487), an action to quiet title to real property:

“‘The facts necessary to be shown in order to call into exercise the principles of equitable estoppel are stated by Chief Justice Field in *Biddle Boggs vs. Merced Min. Co.*, 14 Cal. 279, 367, as follows: “. . . *first*, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; *second*, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; *third*, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.”’ (See, also *City of Los Angeles vs. Babcock*, 102 Cal. App. 571, (283 Pac. 314).)

“In *Nilson vs. Sarment*, 153 Cal. 524, at 531 (96 Pac. 315, 126 Am. St. Rep. 91), it is said:

“‘Apart from other considerations, two essential elements of an estoppel are, 1. That the party asserting it must have been ignorant of the true state of facts and of the means of acquiring knowledge of them, and 2. That he must have relied upon the statement or admission of the party whom he seeks to bind by such statement or admission.’

“In *Maggini vs. West Coast Life Ins. Co.*, 136 Cal. App. 472, at page 479 (29 Pac. (2d) 263), it is said:

“The defense of estoppel arises from section 1962, Code of Civil Procedure: “Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; . . .” It is essential that the party pleading an estoppel must be ignorant of the true state of facts and must have been intentionally led to alter his course to his injury by the act of the other. (10 Cal. Jur., p. 626.) Hence there can be no estoppel of one who has no knowledge of the facts as there can be no claim of estoppel by one who knows his representations are false and knows that the other party is ignorant of their falsity.’”

In the case of *Moriarty v. California Western States Life Ins. Co.*, 22 Cal. App. 2d 260, 70 P. 2d 684, the Court reiterates the rule as follows:

“But the particular factors necessary before applying the doctrine in any action are set forth in the leading case of *Biddle Boggs vs. Merced Min. Co.*, 14 Cal. 279, at page 367, as follows: ‘It is undoubtedly true that a party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said, in such cases, to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property, it must appear, *first*, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; *second*,

that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; *third*, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and, *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.' We have shown above that Mr. Benjamin had no authority on behalf of the defendant to waive any provisions of the policy. Plaintiff points to nothing showing he had authority to estop the defendant. Assuming, solely for the purposes of this decision, that he did have authority, there is no evidence he did not speak truly. There is no evidence the deceased did not know all of the facts as completely as did the defendant. No single fact appears wherein or whereby, if an estoppel arose, the deceased would have been estopped, but it is a cardinal rule that an estoppel must be mutual. (10 Cal. Jur. 627.)"

Applying the rule in the *Moriarty* case last quoted, *supra*, and applying it to the evidence in this case, there is not an iota of testimony that anyone even remotely connected with Appellees in any manner at all discussed the fifteen months limitation, or said or did anything to induce Appellants from commencing their suit within the time limited, nor in any manner even suggested that the fifteen months limitation would be waived, and there is not even a suggestion that anything whatsoever prevented Appellants from commencing their suit at any time after the letters of August 30, 1946, in which the Appellants were notified that Appellees were standing strictly upon the terms and conditions of the policies.

How, we ask, can it be claimed that Appellees waived any of the conditions of the policies when they were at all times emphatically, and in writing, insisting upon a full compliance therewith?

The trial court found, upon ample evidence, that:

(1) That Appellants' action was not commenced within the time provided for in the statutory policy. [Tr. Vol. I, p. 64, lines 12-15.]

(2) That the Defendants, or any of them, did not waive said provisions. [Tr. Vol. I, p. 64, lines 10-11.]

(3) That Plaintiffs' failure to file suit within the time required by the provisions of said policies, and each of them, was not induced, by any representation or conduct of Defendants, or any of them, or by anyone acting for or in their behalf. [Tr. Vol. I, p. 62, lines 14-19.]

(4) That Defendants, or any of them, are not estopped to rely upon said provisions. [Tr. Vol. I, p. 64, lines 12-13.]

These findings were all findings of ultimate fact, and not conclusions of law as the *ipse dixit* of Appellants in their brief would have it.

Woldson v. Bauman, 132 F. 2d 622, at page 624 (9th Cir.).

These findings were based upon ample testimony, and a statement under these circumstances of the ultimate facts found by the Court in itself should be sufficient to establish that the Court's conclusions of law and judgment are amply supported by the facts found, and were not erroneous, but the only judgment that could be rendered under the testimony.

The Evidence Sustaining the Court's Findings Against Waiver or Estoppel.

As previously indicated, Appellants ask this Court to try this case *de novo*, to pass upon disputed questions of fact, to draw inferences therefrom contrary to those drawn by the trial court, to test the credibility of witnesses not before them, and to make findings contrary to those made by the trial court.

Appellants ask this Court to ignore the rule laid down in Rule 52(a) of the Federal Rules of Civil Procedure, which provides that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses," and the time honored rule in this jurisdiction that "the judge or jury which has seen and heard the witnesses is better qualified to weigh their testimony than is a reviewing tribunal, and findings of fact of the trial body will not be set aside unless clearly erroneous."

Western Union Telegraph Co. v. Bromberg, 143 F. 2d 288 (9th Cir.).

Notwithstanding this extraordinary position, Appellants have not in a single instance in their brief, in quoting testimony which they claim support their plea of estoppel, quoted all of the testimony, but have ignored entirely the contradictory testimony, the testimony on cross-examination and impeachment, and have quoted only isolated bits which they believe, or at least claim, support their plea. While Appellees believe that this method of presenting

an appeal from a factual case is an imposition on the court and an added burden upon Appellees, not contemplated by the rules, they will, at the risk of unduly lengthening this brief and to the end that the appellate court may have the true factual situation before it, review, not isolated portions of the testimony, but *all* of the evidence on the points upon which Appellants claim their plea of estoppel was based.

Appellants' claim of estoppel is based, not upon the record, but upon certain conversations claimed to have been had by Appellant Quon with three different parties connected with Appellees and conversations claimed by Appellants' witness Tang to have been had with a party connected with one of the Appellees.

Appellant Quon claimed to have had certain conversations at El Centro with Carl Quigg, adjuster for all the Appellees in handling the matter, and Herbert Loudermilk, local agent at El Centro, and with Si Carey, local agent for Appellee Niagara Insurance Company, at Brawley, California, and Appellants' witness Tang testified to having conversations with Chester Stutt, manager of the San Francisco office of Appellee New Zealand Insurance Company. The parties referred to, Herbert Loudermilk and Chester Stutt, both died some time prior to the trial of the case and the significance of the testimony of Quon and his witness with reference to their conversations with these parties will be hereinafter noted.

Testimony Relating to Conversations With Carl Quigg.

Since, as the Court found [Tr. Vol. I, p. 60, lines 22-26; p. 61, lines 7-12], that Carl Quigg was at all times after the fire appointed as the sole adjusting representative of all the Appellees to act in all matters and things in relation to the loss and the contracts of insurance, and Appellants and their attorney at all times from three days after the fire were advised thereof, he is the only possible person who could have waived the provisions or estopped the companies from relying thereon and, for that reason, the alleged statements made by him will first be noticed. Appellants in their brief half-heartedly attack this finding of the Court that Quigg was the sole adjusting representative and Appellants knew it, but this fact is so amply established by the evidence that there can be no mistake about it. Quigg testified that he was, immediately after the fire, employed by all of the Appellants as their adjusting representative. The only persons in any manner connected with the Appellees that Appellant Quon came in contact with were Quigg, Carey and Loudermilk. Quon himself testified that the day after the fire Loudermilk told him that he had reported the fire and that the companies were appointing Mr. Quigg to represent them. Carey told him the same thing. Quon knew Quigg and had adjusted several losses with Quigg before. And, last but not least, Appellants in their sworn complaint allege the very fact and reiterate it in their amended complaint filed after practically all of the testimony was in, to the

following effect: “that defendants have at all times since said fire had one agent or employee at all times represent all of said defendants in correspondence and discussing the matter with plaintiffs.” [Tr. Vol. I, p. 14, lines 15-17; p. 45, line 9.]

This reference to a single designated agent of all the Appellees is made throughout Plaintiffs’ complaint and reiterated in the amended complaint filed after the trial had commenced. [Tr. Vol. I, p. 16, line 26; p. 17, line 9; p. 19, line 6; p. 20, line 17; p. 21, lines 21, 24; p. 22, line 15; p. 23, line 2.] Mr. Quigg was the only person mentioned, either in the pleadings or the trial, who represented all of the Appellees and obviously the only person referred to in the pleadings as Appellees’ “designated agent.”

The evidence shows, without contradiction, that Mr. Quigg was appointed the sole adjusting representative for all of Appellees. That the day following the fire Appellant Quon was so advised by the two local agents, that Quigg met Quon at the site of the fire on the second day after the fire. That at that time he looked over the debris with Quon, asked if he had any information pertaining to the values, and advised him that it would be necessary to make statements pertaining to the inventories. He also advised him that it would be necessary to protect the salvage. [Tr. Vol. II, p. 134, lines 13-26.] The day following, or the third day after the fire, Appellant Quon came to Mr. Quigg’s office at El Centro with Mr. Williams, a practicing attorney of El Centro whom Mr. Quigg knew, and at that time and in the presence of Mr. Werner, who also testified in corroboration, Mr. Quon stated to Mr. Quigg that Mr. Williams would represent him in the entire matter of the adjustments. [Tr. Vol. II, p. 136, lines

10-12.] At that time Mr. Quigg stated to Mr. Williams, in Quon's presence, practically the same thing that he had told Mr. Quon the day before. He told him the requirements under the insuring contracts and what he would have to have in order eventually, if there was an approval of the claim, and the details pertaining to it. He did not tell them that he would assist them in the presentation of the claims. He merely pointed out the terms of the contract. [Tr. Vol. II, p. 137, lines 7-12, 25-26; p. 138, lines 1-5.] He had no other conversations with Quon or Williams other than incidental conversations not particularly regarding the loss settlement. [Tr. Vol. II, p. 136, lines 15-17.]

Following the conversation above related with Quon at the site of the fire and the conversations above detailed with Quon and Williams in his office the next day, Quigg had no conversations with either Quon or Williams except one telephone conversation later in which Williams asked for copies of the policies, which Quigg furnished him by mail.

Following these two conversations, and the one telephone conversation, Quigg had absolutely no communication from Quon or Williams, except that Quon, through Williams, furnished Proofs of Loss to Quigg by mail on July 26, 1946, and amended Proofs of Loss on August 9, 1946, to which Quigg replied by letter rejecting the Proofs and advising the Appellants that the companies were standing on the terms of the contracts. [Pltfs. Ex. 1D, *et al.*] Following the sending of this letter of August 30, 1946, Mr. Quigg had no communication whatsoever from the Appellants or their attorney, either oral or in writing, until the middle of November, 1947, several months after the fifteen months limitation had expired, when Quon

telephoned Quigg at San Diego and was advised by Quigg that the Appellees had denied liability. [Tr. Vol. II, p. 142, lines 14-26, *et al.*]

Appellants, on pages 8 and 9 of their brief, present what apparently is their only claim of acts or declarations of Quigg upon which they base an estoppel against Appellees. They state that Quon testified that on or about June 20, 1946, Quigg stated to Quon, "Well, let it go now until you have income tax case now on the government and they are going to take your money anyway, so why don't you wait until later—Why don't you wait until the income tax case is finished first, then settle this claim," and state that Quigg did not deny this conversation.

The answer to this is that the statement made is literally not true, and the trial court so found. While Mr. Quigg did not categorically deny this particular statement, he did, as above quoted from the record, relate all of the transactions and conversations had with either Quon or his attorney on the only two times that he met and talked with either one of them, to wit, on or about May 29 and 30, 1946, and states that nothing was said relating to the loss other than he related, other than incidental conversation not having to do with the loss. Furthermore, by Quon's own clear testimony and admissions on cross-examination, he established conclusively that the alleged conversation of June 20, 1946, did not take place, and the Court, under the evidence, could not have found other than that no such a conversation did not take place.

Quon testified on cross-examination as follows:

"Q. Well, did you talk with Mr. Quigg at any time after you employed Mr. Williams to act as your attorney? A. No, I don't think I remember I did. All I remember, I talked to Mr. Quigg a couple of

times on the empty lot there, and talked to him about these claims.” [Tr. Vol. II, p. 81, line 25, to p. 82, line 3.]

It is undisputed and so found that Mr. Williams was employed on May 30, 1946, and that no conversations were had with Quon after that date, so it is obvious that, this being true and found by the Court, no such conversation as related could have occurred on June 20, 1946.

There is not an iota of evidence of any act or conduct of Mr. Quigg estopping the Appellees or waiving the terms of the policies, and nothing said or done by Mr. Quigg was in any manner calculated to induce the Appellants to refrain from bringing action, or to lead him to believe that the fifteen months provision of the policies would not be insisted on. On the contrary, Mr. Quigg, at the first and only meeting with Quon and his attorney, advised them that they would be required to comply with the terms and conditions of the policies and confirmed this in writing by the letter of August 30, 1946.

Claim Relating to Statements of Si Carey.

On pages 10, 11 and 12 Appellants quote some testimony of witness Quon of a conversation had with Si Carey, of Brawley, California, but again do not give the Court the entire evidence relating to this party and we again find it necessary to supply the missing and controlling facts.

The testimony of Quon was received over Appellees' objections, the Court reserving ruling, that it was incompetent and hearsay and not binding on Appellees, as no authority had been shown on the part of Mr. Carey to make any statements subsequent to the issuance of the policy binding upon the Appellees. The Court later ruled

that the objection was well taken and that Carey did not have authority to bind the Appellees and that the alleged conversations did not establish an estoppel.

It was conceded that Mr. Carey was the agent of Appellee Niagara Fire Insurance Company for the purpose of countersigning and delivering one policy in suit. However, Carey had no authority, either in law or in fact, to bind the Appellees, or any of them, after the execution and delivery of the policy, and particularly not in this instant.

Carey was not acting or assuming to act for Appellants, or any of them, as the record without dispute amply shows. In the first place, according to the Appellant's own testimony, the day following the fire Carey advised him that Mr. Quigg was handling the adjustment. Mr. Quigg so advised him. The Appellants knew and so alleged in their complaint that Mr. Quigg was the man handling the adjustment, and, moreover, there is a bit of evidence which Appellants conveniently overlook in their brief which establishes without controversy that Carey or Carey Brothers were not acting or assuming to act for the Appellees, or any of them.

Appellant Quon testified that in September, 1946, he telephoned Carey Brothers at Brawley, from San Francisco, and asked them to get copies of the Proofs of Loss which his attorney, Mr. Williams, filed with Mr. Quigg from the office of his bookkeeper, Mr. James H. Hicks.

On September 28, 1946, Carey Brothers wrote Appellant Quon at San Francisco, sending copies of the Proofs of Loss, and in the letter stated as follows:

“From our telephone conversation we assume you are taking this case away from Mr. Williams, however we suggest if such assumption is correct you

immediately contact an attorney in San Francisco, giving him details and then having him contact company offices in San Francisco and do the necessary *inasmuch as this office has no knowledge as to what has gone on in your settlement of claims.*" (Italics ours.) [Pltfs. Ex. No. 10.]

The trial court found that the conversation alleged did not establish an estoppel and that Carey had no authority to speak for the Appellants, or any of them, in the transaction, and said findings were amply supported.

Appellees' Claim Regarding Conversation With Herbert Loudermilk.

Appellants, on pages 15 to 17 of their brief, refer to two alleged conversations which Quon claimed to have had with one Herbert Loudermilk.

A rather significant indication of Appellants' attitude regarding the facts of this case is evidenced by the testimony regarding the alleged conversations with Loudermilk. Although Appellants, in their complaint, alleged that the Appellees had, at all times since the fire, one agent at all times represent all of the Defendants in corresponding and discussing the matter with Appellants, and this one person was identified as the witness Carl Quigg, and Appellants throughout their complaint constantly referred to the said designated agent they produced the testimony of the alleged conversations with Herbert Loudermilk as the conversations referred to in their complaint, over Appellees' objection of incompetency and hearsay because the authority to make statements subsequent to the loss binding upon the Appellees had not been shown, and because not within the issues, to which the Court reserved a ruling. It was shown without dispute that Herbert Loudermilk had died

some time prior to the trial, and obviously Appellees could not rebut the testimony. However, the trial court did not believe this testimony by reason of the said Appellant's impeachment and his evasiveness on cross-examination. [Tr. Vol. II, p. 98, lines 12-18.] And, moreover, concluded that it was incompetent because no authority to speak in the matter for Appellants had been shown. [Tr. Vol. I, p. 50, lines 10-20.]

It was shown without dispute that Loudermilk was not acting for Appellees or any of them in connection with the matter, that he did not purport to act, that he notified Appellant Quon the day after the fire that he was not acting, and that Mr. Quigg was coming to act for the Appellees and the evidence amply shows that Mr. Quigg was the only person authorized to act in the matter of the loss and negotiations connected therewith.

Furthermore, the alleged conversations do not even remotely assume to waive the fifteen months limitations or to estop the companies to rely thereon. And further, according to this testimony, one of the conversations occurred about ten days after the fire and the other about a month and a half after the fire, and Appellants did not act upon them if they had any tendency whatsoever to induce any action, but, on the contrary, thereafter filed their claim and amended claim, which was rejected with the notification that the Appellees were standing strictly upon the terms of the policies.

Furthermore, the trial court was entitled to reject this testimony in its entirety due to the failure to show authority to make the statements, the impeachment and evasiveness of said Appellant, and the fact that it was an alleged conversation with a deceased person.

See:

Herbert v. Lankershim, 9 Cal. 2d 409, 71 P. 2d 220;

Thompson v. Machado, 78 Cal. App. 2d 870, 178 P. 2d 838.

Claim of Alleged Conversations With Chester Stutt.

Again we have here the case of Appellants' witness testifying to an alleged conversation with a deceased person. The same situation regarding the Plaintiffs' complaint and the designation of the agent referred to, as was in the case of Loudermilk is true here. Appellants, in their complaint [Tr. Vol. I, p. 20, lines 10-26], allege that in the Fall of 1947 (several months after the expiration of the fifteen months limitation) they contacted an agent of Defendants in San Francisco, California, without designating any particular agent or agent for any particular Appellee, and were advised that this agent, whoever he was, would communicate with the designated agent in Southern California handling the matter. It was not until the trial was under way that Appellants filed an amended complaint and there alleged, "that in the Fall of 1946 one Tye Tang acting for Plaintiffs contacted the general manager of the New Zealand Insurance Company. [Tr. Vol. I, p. 45, line 20.] Mr. Quigg testified that Mr. Stutt was manager of the New Zealand Insurance Company, San Francisco office, and that San Francisco was the head office of the New Zealand, and testified that Mr. Stutt had died prior to the commencement of the trial.

Obviously, in view of Appellants' concealment of the person to whom they were referring in their pleadings, the designation of the Fall of 1946 as the time of the conversation and after the Statute of Limitations had run,

later in the amended complaint changed to 1946, and the general designation as an agent of Defendants, Appellees were not advised and could not controvert the testimony on this point. However, as shown in the discussion of matters relating to Loudermilk, the Court was not required to believe this testimony.

Moreover, this testimony went in under the objection and reserved ruling of Appellees that it was incompetent because of no authority shown. As discussed under the discussion of the conversations with the previous parties, this objection was proper and the Court later ruled that the testimony was not competent and the alleged conversation did not establish an estoppel.

Taking the testimony of Mr. Tang as Appellants' only witness outside of Appellant Quon, it is to the following effect; that in September of 1946 he, at Quon's request, called on the telephone to the office of the New Zealand Insurance Company and was answered by someone who said he was Mr. Stutt.

Over Appellees' objection of incompetency because no authority to bind Appellees had been shown, he testified that the person purporting to be Stutt told him that he had heard something about the case and he was going to wire somebody in Imperial Valley and get some information and let him know. [Tr. Vol. II, p. 120, line 16, to p. 121, line 3.] About a month later he called and was again answered by someone who said he was Mr. Stutt and was told over the phone by this person that he had heard that the case was still under investigation and if he heard anything definite he was going to call him. [Tr.

Vol. II, p. 121, lines 15-23.] About several months later, around February, he called again and again talked with the man purporting to be Mr. Stutt and was told that he hadn't heard anything definite except that the case was still under investigation and he also told me that he would not pay Mr. Quon until he get the recommendation from the adjuster and if he pays probably the rest of the companies will pay too." [Tr. Vol. II, p. 122, lines 2-6.] And again he testified that several months later, he thought around May of 1947, he again called and was advised by the same person that, "and he told me there is nothing he can do except he has to wait until they reach a decision by the adjuster." [Tr. Vol. II, p. 122, lines 2-13, 25-26.] That Appellant Quon was present in his office at all of the times of these alleged telephone conversations and he communicated them to Quon.

While the trial court was not obliged under the circumstances to believe that these alleged conversations took place, there is no iota of testimony that Mr. Stutt, if he did make the statements, was acting or purporting to act for any of the Appellees. According to the testimony of Tang he, Stutt, in each of the conversations, advised Tang that the matter was entirely in the hands of the adjuster.

Moreover, these conversations occurred long before the fifteen months had expired and there is not a suggestion in any of them that Mr. Stutt had anything to do with the adjustment or would do anything regarding it other than to let Mr. Tang know what he heard about it, and far from being any inducement to Appellants not to commence suit, was a direct statement that it was very questionable whether the losses would be paid.

Authorities on Agency.

While, as we believe we have demonstrated above, none of the parties whose acts, declarations or conduct are claimed as the basis for the estoppel, did or said anything in any manner calculated or designed to induce Appellants not to commence their action within the time limited by the policies, there is no evidence that, if they had done so, they had authority to bind the Appellees to a waiver or estoppel of said provisions, with the exception of Mr. Quigg who did nothing but stand upon the strict terms of the policies.

While the facts show that all of the three other parties referred to did not act or purport to act in the matter, but on the contrary always referred the Appellants or their representatives to Quigg, and their lack of actual authority is completely established by the evidence, it is submitted also that they had no ostensible authority whatsoever to act in the manner sought to be established by Appellants.

All of the testimony relating to the various acts of the three parties other than Quigg was received with ruling reserved over Appellees' objection of no authority shown and the Court ruled that no authority had been shown and that the Appellees were not bound by any acts or declarations of said parties, even if they had constituted an estoppel. Appellants offered no evidence whatsoever as to the authority of any of these parties, and there was no testimony as to their status other than Appellees' admission that they were authorized to countersign and deliver policies.

It is fundamental that one who seeks to bind a principal by the acts of an agent, or alleged agent, has the burden of proof of showing, not only (a) that the party was an agent, but (b) that the agent at the time alleged was acting within the course and scope of his employment.

The fundamental rules are epitomized in the following quotation from *Hill v. Citizens National Trust & Savings Bank*, 9 Cal. 2d 172, 69 Pac. 853, as follows:

“A third person, such as appellant, is not compelled to deal with an agent, but if he does so, he must take the risk. He takes the risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers. The rule is cogently stated in 1 Mechem on Agency, second edition, section 743, page 527, as follows: ‘An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to “stop, look and listen.” It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a *general* or *special* one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency *but the “nature and extent of the authority,* and in case either is controverted, the burden of proof is upon them to establish it.”’ (Ernst v. Searle, 218 Cal. 233, 240, 22 Pac. (2d) 715, 717.)” (Italics ours.)

And, of course, the general rules of agency is as applicable to insurance as to any other matter.

14 Cal. Jur. 454.

It is said in 45 *Corpus Juris Secundum* 624:

“An insurance company may be estopped to deny liability, or a ground for forfeiture or avoidance of the policy may be waived, by the acts and statements of an *authorized* officer or agent of the company, but the acts constituting a waiver on estoppel must be

those of an officer or agent whose acts under the circumstances are binding on the company.” (Citing *Alexander v. General Ins. Co.*, 22 Fed. Supp. 157 (S. D. Calif.); *Rice v. Calif. Western States Life Ins. Co.*, 21 Cal. App. 2d 660, 70 P. 2d 516; *Kugler v. I. A. C. of State of Calif.*, 63 Cal. App. 308, 218 Pac. 472.)

And in 45 *Corpus Juris Secundum* 626:

“But to bind the company the acts or representations must have been made by a person acting as an agent of the company within the real or apparent scope of his authority. *It is not every agent of insurer, however, who may waive important contract provisions.*”

And in 46 *Corpus Juris Secundum* 284:

“Such waiver cannot be made by an unauthorized agent.” (Citing *Thompson v. Amer. Fid. Co.*, 102 N. E. 699, 215 Mass. 460.)

And the agent, when he would bind a principal, must be engaged at the time in and about the business of the principal.

Palo Alto Assn. v. First National Bank, 33 Cal App. 214, 224;

Wittenbrock v. J. A. Parker, et al., 102 Cal. 93, 101;

Renton Holmes & Co. v. George Monnier, 77 Cal. 449, 453.

It has been held, and we find no authorities to the contrary where the question has been raised, that authority to countersign and deliver policies carries with it no ostensible authority to act for the companies after the loss, and particularly no authority to waive the limitation clause.

See:

Collins v. Home Ins. Co. of New York, 167 Atl. 621 (Pa.);

Fernando v. Milwaukee Mechanics Ins. Co., 142 Pac. 693 (Wash.);

Hessler v. North River Ins. Co., 207 N. Y. Supp. 529;

Bowlin v. Hekla Fire Ins. Co., 31 N. W. 859, 36 Minn. 433;

Mitchell v. Western Fire Ins. Co., 261 N. W. 300;

Graham v. Niagara Fire Ins. Co., 32 S. E. 579 (Ga.);

Barry & Finan Lbr. Co. v. Citizens Ins. Co., 98 N. W. 761 (Mich.);

Ermentrout v. Girard Fire & Marine Ins. Co., 65 N. W. 635 (Minn.);

Harrison v. Hartford Fire Ins. Co., 59 Fed. 732;

Urbaniak v. Firemen's Ins. Co., 116 N. E. 413, 121 Mass. 439.

Conclusion.

In conclusion, Appellees respectfully submit that the findings of the trial court were not only amply sustained by the evidence, but that there was no competent evidence to the contrary, and that the Court's conclusion of law was correct and the Court did not err in entering judgment for Appellees and submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

HINDMAN & DAVIS,

By E. EUGENE DAVIS,

Attorneys for Appellees.

No. 12569

United States
Court of Appeals
for the Ninth Circuit.

ALFRED HEADY and ESTHER HEADY,
Doing Business as Heady Hotel,
Appellants,
vs.
LAWRENCE E. SLAVIN,
Appellee.

Transcript of Record

Appeal from the District Court
Territory of Alaska,
Third Division

FILED

OCT 16 1950

PAUL P. O'BRIEN,
CLERK

No. 12569

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ALFRED HEADY and ESTHER HEADY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

BAILEY E. BELL,

J. L. McCARREY, JR.,

Anchorage, Alaska.

For Appellee:

R. J. McNEALY,

BUELL A. NESBETT,

Homer, Alaska.

In the United States District Court for the
Territory of Alaska, Third Division

No. Sel. 5707

LAWRENCE E. SLAVIN,

Plaintiff,

vs.

ALFRED HEADY and ESTHER HEADY d/b/a
HEADY HOTEL,

Defendants.

COMPLAINT

Now comes the Plaintiff and of the Defendants,
complains, alleges, and says:

I.

That Plaintiff worked as a carpenter for the Defendants in the construction of Defendants hotel over a period of sixteen (16) forty hour weeks from the second day of October, 1947, to the 23rd day of January, 1948, inclusive, at the special instance and request of the said Defendants, and for the stipulated wage of two (\$2.00) Dollars per hour for each and every hour so worked by Plaintiff, and in addition to the said two dollars per hour, Plaintiff was to receive board and lodging from Defendants, which board was provided by the said Defendants.

II.

That on or about the 23rd day of January, 1948, this Plaintiff and the said Defendants talked together concerning the said work and skilled labor

and the wages due therefore, but the Defendants became evasive as to payment, first agreeing to transfer a certain sawmill by Bill of Sale to Plaintiff, which they failed and neglected to do, and later agreeing to reimburse Plaintiff either in cash or in kind for his skilled labor.

III.

That there is due and owing the said Plaintiff from the Defendants the sum of Twelve Hundred Eighty (\$1280.00) Dollars, which is the fair and reasonable value for Plaintiff's wages, and that though demand has been made by Plaintiff, the Defendants have wholly neglected and refused to pay the said wages or any part thereof, either in cash or in kind.

Wherefore, the Plaintiff prays judgment against Defendants:

1. For the sum of \$1280.00 with interest thereon at the rate of six per cent per annum from the 23rd day of January, 1948.

2. The sum of \$500.00, as fees for Plaintiff's attorney.

3. The Plaintiff's costs and disbursements in this action.

/s/ R. J. McNEALY,

Attorney for Plaintiff.

United States of America,
Territory of Alaska—ss.

Lawrence E. Slavin, being first duly sworn on oath, deposes and says: That he is the Plaintiff in the above-entitled action; that he has read the foregoing Complaint, knows the contents thereof, and that the allegations contained therein are true as he verily believes.

/s/ LAWRENCE E. SLAVIN.

Subscribed and sworn to before me this 6th day of September, 1949.

[Seal] /s/ R. J. McNEALY,
Notary Public for Alaska.

My Commission expires 3/8/'50.

[Endorsed]: Filed September 7, 1949.

[Title of District Court and Cause.]

ANSWER

Come now the above-named Defendants, Alfred Heady and Esther Heady, doing business as Heady Hotel, and for answer to the complaint filed by the Plaintiff herein, admit, allege and deny as follows, to wit:

I.

Defendants admit that Larry Slavin did work some for the Defendants in the construction of the hotel, but deny specifically that he ever worked

sixteen forty-hour weeks or anything like that amount.

II.

Defendants specifically deny that they ever agreed to pay the Plaintiff anything for said work and allege that the Plaintiff offered to work and stated that he would board and room with the Defendants; that he needed something to do and that no price for work was ever agreed upon, except that these Defendants, acting by and through Alfred Heady, told the Plaintiff that they had no money to pay him for labor; that he and Tommy were going ahead and build it and the Plaintiff insisted on helping and stated that he needed a place to live and without any agreement for the payment of any money whatsoever, he did commence working and did work at intervals, never a full week nor never a full day, only working as he saw fit, was never told to do any particular thing, his work was that of a voluntary helper without consideration and gratuitous, and all during said period of time Defendants furnished him board and room as agreed and the said Plaintiff never at any time contended that the Defendants owed him anything or even suggested to them that they were indebted to him in any manner whatsoever until the filing of the complaint in this action, which was done on or about the 6th day of September, 1949.

III.

Defendants specifically deny that they are indebted to the Plaintiff in any sum whatsoever.

Wherefore, these Defendants pray:

1. That Plaintiff take nothing by his complaint.

2. That his said complaint be dismissed.

3. That these defendants recover their costs, together with a reasonable attorney's fee, as provided by law.

/s/ ALFRED HEADY.

United States of America,
Territory of Alaska—ss.

Alfred Heady, being first duly sworn, on oath deposes and says:

That he is one of the Defendants in the above-entitled action and makes this verification for and on behalf of himself and Esther Heady; that he has read the above and foregoing Answer and knows the contents thereof, and believes the same to be true.

/s/ ALFRED HEADY.

Subscribed and Sworn to before me, a Notary Public in and for the Territory of Alaska, this 30th day of September, 1949.

[Seal] /s/ J. L. McCARREY, JR.,

Notary Public in and for
Alaska.

My Commission expires 4/25/50.

[Endorsed]: Filed October 4, 1949.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and for reply to the Answer of the above-named defendants on file in this action, admits and denies as follows:

Plaintiff denies each and every statement and allegation made by the defendants in their Answer which is not in full accord and agreement with plaintiff's Complaint, except only defendants' statement that "no price for work was agreed upon" and in that plaintiff understood he was to have going carpenters' wages.

Wherefore, having fully replied to defendants' Answer, the plaintiff prays for judgment against defendants as in the prayer attached to plaintiff's Complaint filed in the above-entitled action.

/s/ ROBERT J. McNEALY,
Attorney for Plaintiff.

United States of America,
Territory of Alaska—ss.

Robert J. McNealy, being first duly sworn on oath, deposes and says that he is attorney for the plaintiff in the above-entitled action, that he has read the foregoing reply and knows the contents thereof to be true as he verily believes; that plaintiff is absent from Seldovia, Alaska, wherefore he makes this verification.

/s/ ROBERT J. McNEALY,

Subscribed and sworn before me this 11th day of October, 1949.

[Seal]: /s/ V. M. MURRAY,

Notary Public for Alaska.

My Commission expires 11/14/50.

[Endorsed]: Filed October 19, 1949.

[Title of District Court and Cause.]

VERDICT No. I.

We, the jury, duly selected, impaneled and sworn to try the above-entitled cause, do find for the plaintiff and against the defendants, and find that the plaintiff is entitled to recover of and from the defendants the sum of Twelve Hundred Eighty Dollars (\$1280.00), together with interest thereon at the rate of 6 per cent per annum from January 23, 1948.

Dated at Anchorage, Alaska, this 9th day of February, 1950.

/s/ H. L. BLISS,

Foreman.

Entered Journal No. G-21, Page No. 93, Feb. 9, 1950.

[Endorsed]: Filed and entered February 9, 1950.

DEFENDANT'S OFFERED INSTRUCTION
No. I.

You are further instructed that it is the contention of the defendants that they gave the defendant $\frac{1}{2}$ interest in a sawmill that the plaintiff took over the mill and accepted it, repaired it, assisted in operating it and defendants had invested in the mill over \$1000.00 and that the plaintiff said, "This is just a gift from heaven as you owe me nothing."

This in only a circumstance to be taken in consideration with all other evidence.

Given: and exception allowed to Defendant.

.....

District Judge.

Refused: exception allowed to Defendants.

/s/ ANTHONY J. DIMOND,

District Judge.

[Endorsed]: Filed February 9, 1950.

————

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at

issue between the plaintiff and the defendants in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

1.

Lawrence E. Slavin, plaintiff in this action, has brought suit against defendants, claiming that there is due to plaintiff from defendants the sum of \$1280.00 as wages for labor performed by plaintiff as a carpenter for defendants in the construction of defendants' hotel over a period of sixteen (16) forty-hour weeks between October 2, 1947, and January 23, 1948, at the special instance and request of the defendants and for the stipulated wage of \$2.00 per hour together with board and lodging. The plaintiff claims in his complaint that no part

of said sum has been paid and that the entire amount is now due and owing to him by defendants.

The defendants in their answer deny that they have ever agreed to pay the plaintiff for any work done by the plaintiff but that plaintiff offered to work and stated that he would so work for his board and room; that the plaintiff did so work at intervals as and when he saw fit, and that his work was that of a voluntary helper without consideration and gratuitous, so far as concerns the payment of wages, and that during said period of time the defendants furnished plaintiff with board and room as agreed and that plaintiff never at any time contended that the defendants owed him anything or even suggested to them that they were indebted to him in any manner until the filing of the complaint in this action.

In his reply to the defendants' answer, the plaintiff denies each and every statement and allegation made by the defendants in their answer which is not in full accord and agreement with the plaintiff's complaint except only defendants' statement that "no price for work was agreed upon" and that plaintiff understood he was "to have going carpenter's wages."

When you retire to consider of your verdict, you will take with you to the jury room the pleadings in this case, consisting of the plaintiff's complaint, the defendants' answer thereto, and plaintiff's reply to the answer, so that you may there read and consider the pleadings and determine the precise claims and averments of the plaintiff and of the defend-

ants as concerns the subject of this action. However, it should be remembered that pleadings are not evidence and you must not consider anything embraced in the pleadings in this case not sustained by the evidence. Pleadings serve the purpose of setting forth the respective claims and contentions of the parties to an action but are not evidence in support of anything contained therein.

2.

In this case, as in all civil cases, the burden is upon the plaintiff to prove his case by a preponderance of the evidence only, and not, as in criminal cases, beyond reasonable doubt. Preponderance of evidence means the greater weight of evidence. If the evidence in your mind is equally balanced as between the plaintiff and defendants, then the verdict should be for the defendants, because the burden is upon the plaintiff to present evidence of greater weight than that in favor of the defendants before plaintiff is entitled to recover.

3.

The issue in this case is a relatively simple one, and that is whether or not the plaintiff and defendants or either of them agreed that plaintiff should work for the defendants in the construction work described in the pleadings and in the testimony and would be compensated by defendants therefor, at going carpenters' wages, no exact amount of compensation having been agreed upon, or whether

plaintiff agreed to work for his board and lodging only.

If such agreement was made as claimed by plaintiff, then the plaintiff is entitled to the compensation agreed upon for his services and as bearing upon that issue, you may take into consideration all testimony relating to compensation paid for similar work under similar conditions.

If you find that the agreement was entered into as claimed by the plaintiff in his complaint as modified by his reply, and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered.

But unless the plaintiff has proved the averments of his complaint, as modified by his reply, by a preponderance of the evidence, your verdict should be for the defendants and against the plaintiff, for if you find that the agreement between the parties was to the effect that the plaintiff would work for his board and room only, and that there was no agreement to give him any other compensation, or if in your minds the evidence is equally balanced between plaintiff and defendants on this question, then the plaintiff is not entitled to recover from the defendants in this action and your verdict should be for the defendants and against the plaintiff.

4.

The laws of Alaska provide that all questions of

law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you may believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your

judgment, to speak the truth or otherwise as to matters within his knowledge.

5.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses, fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

6.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of coun-

sel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

7.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

8.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, on considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

9.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

10.

You are to consider these instructions as a whole.

It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction and consider it to the exclusion of the other other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in those instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

11.

When you retire to consider of your verdict, you will elect one of your number foreman who will date and sign the verdict unanimously agreed upon. If you find for the plaintiff and against the defendant you should insert in the verdict which is prepared for that contingency and which is marked Verdict No. 1, the amount which the plaintiff is entitled to recover from the defendant but in no event to exceed the sum of \$1280.00, together with interest thereon at the rate of 6 per cent per annum from January 23, 1948, and your foreman should thereupon date and sign said verdict and you should return the same into Court as your verdict. If you find for the defendants and against the plaintiff, your foreman should date and sign the verdict

which has been prepared for that contingency and which is marked Verdict No. 2, and you should thereupon return the same into Court as your verdict.

With your verdict you will return into Court the pleadings, the exhibits, these instructions and the form of verdict not used by you.

Dated at Anchorage, Alaska, this 9th day of February, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed: Filed February 9, 1950.]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now, Alfred Heady and Esther Heady, Defendants in the above-entitled cause, and moves this Court for an order setting aside the verdict and judgment herein and granting a new trial of the above-entitled cause, for the following reasons, viz:

1. Verdict not supported by the evidence and is contrary to the great weight of the evidence.
2. That the verdict is not supported by any competent evidence and is contrary to the law and the evidence.
3. That the Court erred in admitting evidence

that was not competent offered on behalf of the Plaintiff, and objected to by the Defendants.

4. That the Court erred in sustaining Plaintiff's objections to competent evidence offered by the Defendant.

5. That the Court erred in refusing the Defendants' offer of proof, as shown by the record.

This motion is based upon all the files and records in said action.

Dated this 17th day of February, 1950.

/s/ J. L. McCARREY, JR.,
Of Attorneys for Defendants.

[Endorsed]: Filed February 17, 1950.

In the District Court for the Territory of Alaska
Third Division

No. Sel.-5707

LAWRENCE E. SLAVIN,

Plaintiff,

vs.

ALFRED HEADY and ESTHER HEADY,
doing business as HEADY HOTEL,
Defendants.

JUDGMENT

The above-entitled action came on regularly for trial on February 8, 1950 before the above-entitled

court at Anchorage, Alaska, the plaintiff, Lawrence E. Slavin, being present in person and represented by Robert J. McNealy and Buell A. Nesbett, his attorneys, and the defendants, Alfred Heady and Esther Heady, being present in court and represented by their attorneys, J. L. McCarrey and Bailey Bell; a Jury of twelve persons was regularly impaneled to try the cause and testimony, both oral and documentary having been introduced and admitted on behalf of the plaintiff and defendants, wherefore the Court instructed the Jury upon the law in the matter, and counsels for the plaintiff and defendants having argued the matter to the Jury and the Jury retired to consider their verdict; and upon stipulation of counsel for parties hereto at the time the Jury retired, the Jury was directed to bring in a sealed verdict in the event agreement had not been reached by 5:00 p.m. on February 9; but the Jury having reached an agreement prior to that time, returned into court and returned their verdict, which upon being unsealed in open court and in the presence of the Jury was found to be a verdict in favor of the plaintiff reading as follows:

“We, the Jury, duly selected, entitled and sworn to try the above-entitled cause do find for the Plaintiff and against the Defendants, and find that the Plaintiff is entitled to recover of and from the Defendants the sum of Twelve Hundred Eighty Dollars and No Cents (\$1280.00), together with interest thereon at the rate of six per cent (6%) from January 23, 1948.

“Dated at Anchorage, Alaska, this 9th day of February, 1950.

H. L. BLISS,
Foreman.”

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is hereby

Ordered, adjudged and decreed, that judgment be and is hereby given in favor of the Plaintiff, Lawrence E. Slavin, in the sum of Twelve Hundred Eighty Dollars and No Cents (\$1280.00) and that the Plaintiff shall have and recover of and from the Defendants, Plaintiff's costs and disbursements in this action incurred to be taxed by the Clerk of the Court in the manner provided by law, and an attorney's fee in the sum of Two Hundred Dollars, (\$200.00).

Dated at Anchorage, Alaska, this 24th day of February, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered Feb. 24, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Alfred Heady and Esther Heady, a Partnership, doing business as

Heady Hotel, defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on February 24, 1950.

/s/ J. L. McCARREY, JR,

/s/ BAILEY E. BELL,

Receipt of copy acknowledged.

[Endorsed]: Filed March 17, 1950.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That we, the undersigned, Alfred Heady and Esther Heady, doing business as Heady Hotel, as Principals, and John B. McLaughlin and Carl Baier of Homer, Alaska, as Sureties, hereby acknowledge ourselves to be indebted and firmly bound to Lawrence E. Slavin, Plaintiff hereinabove named, in the sum of Sixteen Hundred (\$1600.00) Dollars, lawful money of the United States of America, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, administrators, executors, successors, and assigns, jointly and severally, firmly by these presents.

Signed, sealed and executed by Alfred Heady and Esther Heady, of Homer, Alaska, Principals, this 3rd day of March, 1950, at Homer, Alaska.

Signed, sealed and executed by John B. McLaugh-

lin, one of the sureties at Homer, Alaska, this 3rd day of March, 1950.

Signed, sealed and executed by Carl Baier, one of the sureties at Homer, Alaska, this 3rd day of March, 1950.

The condition of this obligation is such that,

Whereas, Alfred Heady and Esther Heady, doing business as Heady Hotel, are appealing to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment rendered, made, and entered in the above-entitled Court and cause on the 9th day of February, 1950, wherein and whereby it is ordered, adjudged, and decreed that Lawrence E. Slavin, plaintiff above named, have and recover from the defendants, Alfred Heady and Esther Heady, doing business as Heady Hotel, the sum of Twelve Hundred Eighty Dollars and No Cents (\$1280.00), and the further sum of interest thereon at the rate of six per cent (6%) per annum from January 23, 1948, and the further sum of Two Hundred Dollars (\$200.00) as attorney's fees, together with costs.

Now, therefore, if the said Alfred Heady and Esther Heady, doing business as Heady Hotel, shall prosecute its appeal to effect and shall pay the judgment in full, together with costs, interests, and damages for delay, or for any reason, the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of judgment and costs, interests, and damages as the Appellate Court may adjudge and award, then this obligation to be void, otherwise to be and remain in full force

and effect, and to be enforceable against the above-bounden sureties under and in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure.

In witness whereof, the parties hereto have hereunto set their hands and seals on the dates hereinabove set forth.

[Seal] /s/ ALFRED HEADY,

[Seal] /s/ ESTHER HEADY,
Principals.

[Seal] /s/ JOHN B. McLAUGHLIN,
Surety.

[Seal] /s/ CARL BAIER,
Surety.

United States of America,
Territory of Alaska—ss.

I, John B. McLaughlin, the undersigned, whose name is subscribed to the foregoing bond as surety, being first duly sworn, depose and say:

That I am a resident of the Third Judicial Division, Territory of Alaska, and that I am not an attorney nor counsellor at law, Clerk of any court, marshal, deputy marshal, or other officer of any court, and that I am worth the sum of Sixteen Hundred (\$1600.00) Dollars over and above all of my just debts and liabilities, exclusive of property exempt from execution.

/s/ JOHN B. McLAUGHLIN.

Subscribed and sworn to before me this 3rd day of March, 1950.

[Seal] /s/ BENJ. O. WALTERS,
Notary Public,
Territory of Alaska.

My commission expires: 12-29-52.

Approved April 10, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

United States of America,
Territory of Alaska—ss.

I, Carl Baier, the undersigned, whose name is subscribed to the foregoing bond as Surety, being first duly sworn, depose and say:

That I am a resident of the Third Judicial Division, Territory of Alaska, and that I am not an attorney, clerk of the court, marshal, deputy marshal, or other officer of any court, and that I am worth the sum of Sixteen Hundred (\$1600.00) Dollars, over and above all of my just debts and liabilities, exclusive of property exempt from execution.

/s/ CARL BAIER.

Subscribed and sworn to before me this 3rd day of March, 1950.

[Seal] /s/ BENJ. O. WALTERS,
Notary Public,
in and for Alaska.

My Commission Expires 12/29/'52.

[Endorsed]: Filed April 10, 1950.

[Title of District Court and Cause.]

ORDER

The above matter coming on to be heard on the defendant's motion for an extension of time until May 20, and the Court being fully advised in the premises,

It is hereby ordered that the defendants be given an enlargement and extension of time for the filing and docketing of the transcript in the United States Circuit Court of Appeals for the Ninth Circuit until on or before May 20, 1950.

Done in open Court this 28th day of April, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 29, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter coming on to be heard on the application of the defendants in the above-entitled cause of action, and for good cause shown,

It is hereby ordered that the time for filing of the appeal in the above-entitled cause is hereby enlarged to, and including June 5, 1950.

Dated May 18, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered May 18, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON

Come now the above-named defendants, Alfred Heady and Esther Heady, doing business as Heady Hotel, in the above-entitled cause and make the following, their statement of points relied on in their appeal, namely:

1. The Court erred in overruling the defendants' objection to the introduction of any evidence at the commencement of the trial.

2. The verdict as rendered was not supported by sufficient evidence, but was directly contrary to the evidence.

3. The verdict as rendered was against the law.

4. The Court erred in allowing incompetent evidence to be introduced on the part of the plaintiff, over the objections of the defendants, as shown by the transcript of the testimony and the Court proceedings.

5. The Court erred in refusing to strike out certain testimony on a motion of the defendants as shown by the transcript filed herein.

6. The Court erred in sustaining the plaintiff's objection to competent testimony offered by the defendants.

7. The Court erred in giving instructions as follows, to wit:

Instruction No. 3, first paragraph:

“The issue in this case is a relatively simple one, and that is whether or not the plaintiff and defendants, or either of them, agreed that plaintiff should work for the defendants in the construction work described in the pleadings and in the testimony and would be compensated by defendants therefor, at going carpenter wages, no exact amount of compensation having been agreed upon, or whether plaintiff agreed to work for his board and lodging only.”

Instruction No. 3, paragraph 2:

“If such agreement was made as claimed by plaintiff, then the plaintiff is entitled to the compensation agreed upon for his services and as bearing upon that issue, you may take into consideration all testimony relating to compensation paid for similar work under similar conditions.”

Instruction No. 3, paragraph 3:

“If you find that the agreement was entered into as claimed by the plaintiff in his complaint as modified by his reply, and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered.”

Instruction No. 3, paragraph 4:

“But unless the plaintiff has proved the aver-

ments of his complaint, as modified by his reply, by a preponderance of the evidence, your verdict should be for the defendants and against the plaintiff, for if you find that the agreement between the parties was to the effect that the plaintiff would work for his board and room only, and that there was no agreement to give him any other compensation, or if in your minds the evidence is equally balanced between the plaintiff and defendants on this question, then the plaintiff is not entitled to recover from the defendants in this action and your verdict should be for the defendants and against the plaintiff.”

Instruction No. 7, as follows:

“The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amount so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.”

Which instruction were objected to, and were given over defendants' objections and exception was allowed to the defendants in each instances.

8. The Court erred in not sustaining the defendants' motion to dismiss the case at the close of the plaintiff's evidence.

9. The Court erred in overruling the defendants' motion to dismiss at the close of all of the evidence.

10. The Court erred in submitting on a quantum meruit instruction when the action was based upon an exact, explicit contract which was not proven.

11. The Court erred by asking one of the jurors after the case was fully completed, to wit: Robert Claypool, if Bailey E. Bell was not still representing him in unfinished business before the District Court, which provoked a discussion by which it was disclosed that Bailey E. Bell, one of the attorneys for the defendants, was still representing Robert Claypool in a case only partially finished. However, Robert Claypool had never been asked whether or not Bailey E. Bell was representing him in any legal matters, and the Court took it upon itself to raise the question, after all the evidence was in, and the case had been closed. And, at a time there was still two alternate jurors serving, and Mr. Claypool could have been dismissed, if the plaintiff had objected to his serving, but the Court did not excuse him. By allowing a discussion in the presence of the entire jury to be had, in which it was admitted freely that Bailey E. Bell was representing Robert Claypool in an unfinished matter before the same Court, but before a different Judge, which matter had been tried, but not decided, and caused the jurors to misunderstand the effect thereof, which effect was evidenced by the rendering of the unconscionable verdict so rendered, that this matter did influence the jury.

12. Error of the Court in overruling the defendants' motion for a new trial, when it became apparent that the verdict, as rendered, was excessive, unjust, and unsupported by the evidence, and especially in not requiring the plaintiff to file a remittitur, remitting a substantial part of the verdict and judgment, which on its face showed the prejudice of the jury.

13. The Court erred in refusing to give defendants' offered instruction 1.

14. The Court erred in adding the words to instruction 3, in the second line, as follows: "or either of them," over the objection of the defendants' counsel, as stated in the record, because there is no evidence of any agreement referred to only in the presence of both of the defendants.

15. The Court erred in adding to instruction 3, after it had finished reading all the instructions to the jury, the words: "going carpenter wages," as shown by the transcript; by giving this added instruction, the Court inferred at least, "going carpenter wages at Anchorage." This was given over counsel for defendants objection, and at the instance and the request of the attorney for the plaintiff.

16. The Court erred in re-reading a part of the instructions as amended which included the words: "at going carpenter's wages," and the Court further erred in adding an oral statement to the jury as follows: "If such agreement was made as claimed by plaintiff, then the plaintiff is entitled to the compensation agreed upon for his services, and as bear-

ing upon that issue, you may take into consideration all the testimony relating to compensation paid for similar work under similar conditions.

If you find that the agreement was entered into as claimed by the plaintiff in his complaint, as modified by his reply, and that he rendered services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered.” This instruction being given orally at a late moment after the instructions had been read, was unfair to the defendants, and clearly left the impression with the jury that the Trial Judge believed the plaintiff was entitled to recover,

Dated at Anchorage, Alaska, this 17th day of May, 1950.

/s/ BAILEY E. BELL,

/s/ J. L. McCARREY, JR.,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed May 18, 1950.

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME
TO PERFECT APPEAL

Come now the above-named defendants, acting by and through one of their attorneys of record, Bailey E. Bell, and move this Honorable Court for an

Order extending the time for filing an appeal of the above-entitled cause in the Circuit Court of Appeals in San Francisco, California, until and including the 10th day of June, 1950, and as grounds for said motion state:

1. That the transcript has been finished and is in the mail, but extra time is needed to insure the fact that the transcript will reach the United States Circuit Court of Appeals in time.

/s/ BAILEY E. BELL,

Of Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed U.S.D.C. June 3, 1950.

[Endorsed]: Filed U.S.C.A. June 6, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter coming on to be heard on the application of the defendants in the above-entitled cause of action, and for good cause shown,

It is hereby ordered that the time for filing of the appeal in the above-entitled cause is hereby enlarged to and including June 10, 1950.

/s/ ANTHONY J. DIMOND,

District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 3, 1950.

In the District Court for the Territory of Alaska
Third Division

No. Sel-5707

LAWRENCE E. SLAVIN,

Plaintiff,

vs.

ALFRED HEADY and ESTHER HEADY,
dba HEADY HOTEL,

Defendants.

Before: The Honorable Anthony J. Dimond,
United States District Judge.

February 8, 1950

Appearances:

For the Plaintiff:

ROBERT J. McNEALY and
BUEL A. NESBETT of
McCUTCHEON & NESBETT.

For the Defendants:

BAILEY E. BELL and
J. L. McCARREY, JR.

Whereupon the Clerk proceeded to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and counsel for both plaintiff and defendants examined and exercised their challenges against said

Jurors, until the Jury was complete. Whereupon said Jury was duly sworn to well and truly try the above-entitled cause and a true verdict render in accordance with the evidence and the instructions of the Court.

Opening statement to the Jury was made by Robert J. McNealy on behalf of plaintiff.

Opening statement to the Jury was made by J. L. McCarrey, Jr., on behalf of defendants.

PROCEEDINGS

LAWRENCE E. SLAVIN

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct-Examination

By Mr. McNealy:

Q. Will you state your full name to the Court and Jury, please? A. Lawrence E. Slavin.

Mr. McCarrey: May I interrupt? I would like to ask that the rule be invoked.

The Court: All persons who expect to testify as witnesses will remain outside the court room and outside the hearing of the court room, and I will ask counsel to see that [*3] none of them come in to be seated. Sometimes witnesses are not advised.

Mr. McNealy: We have no other witnesses, except Mr. Slavin.

The Court: That makes it rather simple in your behalf.

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Testimony of Lawrence E. Slavin.)

Q. (By Mr. McNealy:) What is your home address, Mr. Slavin? A. Homer, Alaska.

Q. How long have you lived in Homer, Alaska?

A. I came there the first time in 1920.

Q. What is your occupation?

A. Carpenter and fisherman.

Q. How long have you been a carpenter?

A. About 20 years.

Q. Are you a member of the Carpenters Union?

A. They have a local started in Homer now.

Q. Have you ever had occasion to work for the defendants in this action, Mr. and Mrs. Heady?

A. I did.

Q. State, if you can, about what date that you went to work for them?

A. I began there on October 2nd, 1947, and worked there until the latter part of January, the 22nd or 23rd.

Q. Do you know how many weeks that was?

A. Six weeks. [4]

The Court: I missed part of the answer. You said you began work——

A. October 2nd.

The Court: Until when?

A. January 23.

Q. (By Mr. McNealy:) Did I understand you correctly that you worked from the 2nd of October until the 23rd of January? A. Yes.

Q. That is more than six weeks?

A. It may be more than six weeks.

(Testimony of Lawrence E. Slavin.)

Q. Did you, or did you not allege in your complaint that you worked sixteen weeks?

A. Well, yes, it is sixteen weeks.

Q. How many hours a week did you work?

A. Forty hours.

Q. What, if anything, did you do for the defendants, Mr. and Mrs. Heady?

A. Well, the second day I worked there I started putting in doors and windows in the hotel. It was just a shell of a building when I started, and I continued on with the sub-floors, stairways and continued on through the building until that time when I left them.

Q. You put in doors and windows and stairways?

A. Yes [5]

Q. What did they pay you for the sixteen weeks work at forty hours per week?

Mr. Bell: I object to the question. It is not based upon the prior evidence and assuming something not in evidence.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. McNealy): What did they pay you for the sixteen weeks work at forty hours per week?

A. All I received at that time was my board.

Q. In the answer of the defendants they have alleged that they furnished you board and room?

A. No, I roomed with another fellow in his cabin.

Q. You roomed with another fellow?

A. Yes, in his cabin.

(Testimony of Lawrence E. Slavin.)

Q. They did furnish you with board?

A. Yes.

Q. Prior to the time you went to work for the Headys for whom did you work?

A. Squeaky Anderson of the Seldovia Alaska Packers,

Q. Is that a cannery? A. Yes.

Q. In what capacity did you work for Squeaky?

A. As a carpenter. [6]

Q. You have stated, I believe, that you have twenty years experience as a carpenter?

A. Yes, sir.

Q. How much per hour, if you remember, did Squeaky Anderson pay you?

Mr. Bell: Object as incompetent, irrevelant and immaterial. This is not on a suit quantum meriut, but on a direct contract, so pleaded.

The Court: That is the way it was pleaded in the complaint. The reply may——

Mr. McNealy: Your Honor, in the reply we did state that there was no actual price agreed upon. It was an error on my part in drawing the complaint in stating that there was a stipulated amount.

The Court: What is the purpose of this question, to prove the going carpenters wages?

Mr. McNealy: Yes.

Mr. Bell: That wasn't the question.

The Court: The objection is overruled.

Q. (By Mr. McNealy): Go ahead and answer the question.

(Testimony of Lawrence E. Slavin.)

A. Squeaky paid me two dollars an hour and board and room.

Q. Was that the going carpenters wage at that time?

A. I believe that was the cannery wage at that time.

Mr. Bell: Your Honor, I move to strike the answer as [7] not responsive to the question, and further that it is outside the pleadings and not within the issues.

The Court: Motion is denied.

Q. Where did you perform this work for Squeaky Anderson?

A. There at the cannery in Seldovia.

Q. Seldovia, Alaska? A. Yes.

Q. How far is Seldovia from Homer, Alaska?

A. Approximately sixteen miles.

Q. Just across the bay?

A. Just across the bay.

Q. Just across the bay there? A. Yes.

Q. When you went to work for Mr. and Mrs. Heady did you expect to get paid?

Mr. Bell: I didn't catch that question.

The Court: Will the reporter read the question, please.

(The reporter reads the question.)

Mr. Bell: I object as calling for a conclusion.

The Court: The objection is sustained.

Q. Were you paid? A. No.

Q. Now, Mr. Slavin, you have stated that you worked for the Headys on the hotel. Will you ex-

(Testimony of Lawrence E. Slavin.)

plain to the Court and to the Jury all the circumstances surrounding your employment with [8] the Headys between the dates of October 2nd and January 23rd?

A. Well, I came to Homer the 2nd of October. Tommy was working in the hotel, and I said to Tommy, "Give me a hammer and I will help you."

The Court: Who was that?

A. Tommy Wickland. He was working with Al at that time, so I proceeded to help him that afternoon and evening. I told them that evening at supper I could help them for a few days. The next day they gave me the windows and doors to hang. I proceeded with that. At the time they were working on a water system and hauling coal. The second day I was there Al told me at that time he couldn't see his way clear then to pay me wages, but he was keeping track of the time and he would pay me at some time later. So on the strength of that I sent and got my tools. From then on I was just working at the windows and doors the sub-flooring and one thing or other for a period of about six weeks, and I worked along in the building, got it enclosed for cold weather. That is the way it carried on until the latter part of January.

Q. Your carpenter tools were at Seldovia?

A. Yes, I had left them there on the dock to ship outside.

Q. Explain, if you can, how you got them over, and who paid for the transportation.

A. I sent a wire to Steve Stowzowski—[9]

(Testimony of Lawrence E. Slavin.)

The Reporter: Can you spell that last name, please?

The Witness: Zow—No, I'm afraid I can't.

Mr. McNealy: I believe I can, if Your Honor will permit.

The Court: Counsel may be permitted.

Mr. McNealy: S-t-o-w-z-o-w-s-k-i.

A. I wired him to bring my tools over, and he brought them on the next trip. I paid him for them, and proceeded to go to work.

Q. Explain, if you can, why you had your tools shipped from Seldovia over to Homer?

A. As I stated, on the strength of Al's statement that he needed someone and said he couldn't pay me then, but he was keeping track of the time and at a later date he would reimburse me, so that is the reason I sent for the tools.

Q. Has he paid you to this date?

A. No, he hasn't.

Q. He hasn't? A. No.

Q. Has he paid you any part of it?

A. No.

Q. Who did the skilled work on the hotel?

A. I believe I did up until the time I left.

Q. What did this skilled work consist of.

A. Hanging the doors and windows and other finish jobs and stairways. There are a couple of spiral stairways, or stairs [10] built on a turn, and stairs down in the basement.

Q. I hand you this and ask if you know what it

(Testimony of Lawrence E. Slavin.)

is? A. Yes, that is the Heady Hotel.

Q. Is that a true representation of it?

A. Yes, it is of the hotel.

Mr. McNealy: I offer this picture in evidence.

Mr. McCarrey: No objection.

The Court: Without objection it may be admitted in evidence, marked Plaintiff's Exhibit No. 1.

Q. Mr. Slavin, I believe you stated that Mr. Heady and Tommy were putting in water lines.

A. Yes.

Q. What were you doing during that time?

A. Putting in doors and windows and laying sub-flooring.

Q. What time of the year was that?

A. In October, right after I started working.

Q. By your work for the defendants, Mr. and Mrs. Heady, did they get into the hotel any sooner than they would otherwise?

Mr. Bell: Objection, calling for a conclusion of the witness.

The Court: Overruled.

Q. Did they, by reason of your work, get into the hotel sooner than they would otherwise?

A. Yes. [11]

Q. How much sooner, if you know?

A. I couldn't say definitely, but three or four months no doubt.

Q. I am going to hand you Plaintiff's Exhibit No. 1, being the representation of the outside of the Heady Hotel, and ask if you can describe to the

(Testimony of Lawrence E. Slavin.)

jury any of the work that you performed there.

A. Well, it was installation——

Q. And to the Court.

The Court: Hold it up to the jury. The jury passes on this question.

A. The installation of the windows. There are fifty-four double sash windows, and a couple of single sash. I think there is 4 - 6 - 8—there is 10 outside doors and the chimneys. I made and set the frames for all the chimneys. I believe that takes in all that is visible on the outside that I did.

Q. What work did you do inside the hotel?

A. The biggest part of both sub-floors and the stairways and finishing up their living quarters in the back end and started on upstairs then to finish up the rooms.

Q. According to your statement how much do the defendants, Mr. and Mrs. Heady owe you?

A. I figure twelve hundred and eighty dollars.

Mr. McNealy: Your witness.

The Court: Counsel for defendants may examine.

Cross-Examination

By Mr. Bell:

Q. When was it that you worked for Squeaky Anderson?

A. That was the fall of forty seven just prior to the time I came to Homer.

Q. How long did you work for Mr. Anderson?

A. I believe it was around five or six weeks.

(Testimony of Lawrence E. Slavin.)

Q. You say you drew regular cannery wages?

A. I don't definitely know that was cannery wages. That is what he said he could get me.

Q. Did he have you repairing buildings?

A. No construction.

Q. Who else was working besides you.

A. George Gar was there. He had been a carpenter with Squeaky all summer, and a man by the name of Johnny Munson.

Q. Did you ever do any fishing? A. Yes.

Q. Do any fishing for Squeaky? A. Yes.

Q. Where had you worked as a carpenter before you worked for Squeaky?

A. I had worked for Squeaky that spring.

Q. Had you done any other carpenter work in Alaska?

A. Oh, yes, out here on the Post from forty to forty-three, [12] I believe.

Q. How many hours a day did you work out here on the Post?

A. I believe sometimes working ten hours.

Q. Down there when you came to see him, to see Mr. Heady was it October 2nd, you think?

A. It were October 2nd.

Q. How did you come to Homer?

A. I believe I came on the mail boat.

Q. Where were you intending to go?

A. I planned on being around Homer to get some surveying done and then——

Q. What was that? A. A homestead.

Q. A homestead? A. Yes, a homestead.

(Testimony of Lawrence E. Slavin.)

Q. Your homestead? A. My father's.

Q. You intended to stay around Homer while this surveying was being done?

A. I figured on that.

Q. Did you have a house there on the homestead?

A. There was a house on the homestead, but there was a family living there.

Q. A man and his family living there?

A. Yes, at that time there was a man and his family staying [13] there.

Q. You knew Al, Mr. Heady? A. I did.

Q. You knew that Al was trying to build a log building there for a hotel? A. Yes.

Q. Did he have the roof on it? A. Yes.

Q. Did you know this gentleman, Tommy Wickland, before that time? A. Yes.

Q. He was a carpenter?

A. Yes, he worked at the base here.

Q. When you first went to Tommy on October 2nd was Mr. Heady there? A. No, he wasn't.

Q. You said to Tommy give me a hammer and I will help you out? A. Yes.

Q. And he got you a hammer? A. Yes.

Q. And you helped him out? A. Yes.

Q. About what time of day was it that you got there? A. About 2 o'clock. [14]

Q. Had you come from Seldovia that day?

A. Yes.

Q. Had you intended to stay in Homer?

A. For awhile, yes.

(Testimony of Lawrence E. Slavin.)

Q. You worked on there until it got dark?

A. About 5 o'clock.

Q. The sun did set at about 2:50 at that time of the year? A. I don't remember.

Q. Did you work until it was too dark to work inside? A. I can't recall.

Q. It was pretty cold? A. Not that day.

Q. It was about that time?

A. It was beginning to get cold.

Q. Where did you eat your evening meal?

A. At the Headys'.

Q. Did you have any talk with them that evening? A. Yes, we talked that evening.

Q. What did you talk about?

A. Sundry things, everything I suppose. All the gossip in town came up.

Q. You were friends of the Headys?

A. Yes.

Q. Did you tell Mr. and Mrs. Heady you were going outside? A. I believe so. [15]

Q. And I believe you said you had to hang around until you could get some surveying done?

A. I guess so.

Q. I believe you said Mr. Heady told you he had no money to pay you with that he and Tommy were just building it themselves?

A. I believe so.

Q. You did know that Mr. Heady had no cash to put into it? A. At that time, yes.

Q. Did Mr. Heady say anything about how much he would pay you?

(Testimony of Lawrence E. Slavin.)

A. He said he was keeping track of the time and he would reimburse me and I supposed that would be all I had coming.

Q. He didn't say anything about price?

A. No.

Q. Did you say anything to him that night to the effect that if he would furnish you with a place to stay and room and board or food until you were ready to go out that you would be glad to help him?

A. I told him I would be glad to give him a few days work.

Q. Those first few weeks you didn't intend to charge him?

A. I didn't think there was any charge.

Q. You said on your direct examination that a couple of weeks later you sent a wire over and got your tools sent over. [16]

Mr. Nesbett: Objected to——

Mr. Bell: It is——

Mr. Nesbett: Just a moment please.

The Court: Sustained.

Q. Did you testify that about two weeks later you sent for your tools?

A. No.

Q. When did you?

A. I came over on the mail boat if I remember rightly on Monday or Tuesday, and I believe that Friday was the last date of this mail boat, and I had the tools come on that boat.

Q. You think you had them come down on Friday following the day you landed there?

(Testimony of Lawrence E. Slavin.)

A. Yes.

Q. And if it shows that you landed there on Thursday you still think you had them come over on Friday?

A. It would be impossible for me to do it. It would be the following mail boat that I came over on and there are two trips a week.

Q. Where were you going outside?

A. Well, I don't know as—I generally visit around Seattle and then go over in the country where I was born and raised and Lord knows where I would have gone to.

Q. You are a single man?

Q. Never been married? [17] A. No.

Q. Did you live on your father's homestead a good long time? A. Yes.

Q. How long? A. Ten years.

Q. How far is that from Homer?

A. About two and a half miles East of the Heady Hotel.

Q. Did you finally go outside? A. Yes.

Q. When did you go?

A. I believe it was the 5th of February.

Q. How did you go? A. I flew out.

Q. Did you stay with the Headys until you went outside?

A. I boarded there. I was staying with Tommy Wickland.

Q. Who furnished the beds?

A. I furnished my own bedding.

Q. You had sheets?

(Testimony of Lawrence E. Slavin.)

A. My own bedding—my own sheet blankets.

Q. Who furnished the bed?

A. I believe the Headys. That was at Tommy Wickland's.

Q. How far was Tommy's place from where the Headys lived? A. Oh, probably 300 yards.

Q. And you stayed over at Tommy Wickland's and you had your meals at the Headys' place? [18]

A. Yes.

Q. Who did your laundry?

A. Every bit of laundry I had I did it myself.

Q. You are sure Mrs. Heady didn't do it?

A. I believe it was just before Christmas she said she would be glad to do my laundry. It was a kind of shack and drying conditions weren't good.

Q. After you got to the hotel she did do it for you? A. We did it together.

Q. Sometimes you would help her with the laundry? A. Yes.

Q. Did you help her with other household work?

A. No.

Q. That was the only house work?

A. I believe so.

Q. You did help them with the car—the truck?

A. Yes.

Q. Some days it was too bad to work?

A. No, I was inside working and enclosing the building.

Q. Did you ever use the truck for your own uses? A. Yes, maybe half a dozen times.

Q. You did have the engineer survey your place?

(Testimony of Lawrence E. Slavin.)

A. Yes, I think we was out there a day or day and a half.

Q. Did you stay at the home property at that time? A. No. [19]

Q. You drove back and forth? A. Yes.

Q. You drove Mr. Heady's truck for that?

A. I believe I used it.

Q. Did you do any hauling otherwise with his truck?

A. I don't recall doing any hauling only there was one time I went to the dock to pick up some oil. At that time Heady had about four drums of oil himself, oil I had bought in Seldovia at one time and brought back.

Q. For whom?

A. For Heady and for myself.

Q. What did you do with that oil?

A. It set there by the hotel until last fall and I went and got it.

Q. That was outside by the hotel? A. Yes.

Q. The Heady Hotel? A. Yes.

Q. Did Mr. Heady say to you this, or this in substance, "I don't need you very bad that Mr. Tommy Wickland and I are going to have to build it because we don't have any money to pay for it"?

A. No.

Q. Tommy Wickland was capable of building it?

A. No, I don't think so according to his own statement. [20]

Q. Tommy did go ahead and finish up the hotel after you left? A. Yes.

(Testimony of Lawrence E. Slavin.)

Q. He put the window and door casings in?

A. Yes.

Q. And the baseboards down? A. Yes.

Q. Didn't you tell Mrs. Heady—I withdraw that.
Did you work during Christmas week?

A. Yes, I believe we did.

Q. Stop just a minute.

A. I would say yes.

Q. Did you work Christmas day? A. No.

Q. Did you work New Years day? A. No.

Q. Did you work the second week in January?

A. I suppose I did.

Q. You just don't remember?

A. I was working practically all the time I was there.

Q. Were you there at Thanksgiving?

A. Yes.

Q. Did you work Thanksgiving day?

A. No.

Q. You had Thanksgiving dinner at the Heady place, didn't you? [21]

A. I tell you I don't recall that. There was one holiday we went over to Carl Byers and I forget, but I think that was Christmas.

Q. You and the Headys were very close friends, weren't you? A. Yes, we were.

Q. What hour in the morning did you ordinarily go to work? A. To begin with at 8 o'clock.

Q. As the time went on did you change that point of going to work to a later hour?

A. To begin with we got in just about a full

(Testimony of Lawrence E. Slavin.)

day, but later on after we got it enclosed we went to work a little later and in time we got gas lanterns and worked until quite late in the evenings, some evenings especially before they moved in. They were in a hurry to get moved in because of conditions down there where they was.

Q. How long a period of time did you do that with the gas lanterns in the evening?

A. Didn't do it steady at all, but off and on.

Q. That was on the stairway? A. Yes.

Q. Did you tell Mrs. Heady this, or this in substance, that you would like to build that stairway that you had always wanted to? A. Yes.

Q. You wanted to build it a certain way that you had in mind? [22] A. Yes.

Q. And she said alright?

A. I don't believe it was Mrs. Heady. I believe it was Al, we always talked things over with.

Q. He said go ahead

A. Yes. He turned it over to me. He always seemed satisfied to.

Q. He always let you do it just as you wanted to? A. Yes.

Q. Isn't Mr. Heady a carpenter?

A. I wouldn't say a first class carpenter. He has done carpenter work.

Q. Did he work as a carpenter out at the Base with you? A. On form work, yes?

Q. Were you doing form work too?

A. Yes.

(Testimony of Lawrence E. Slavin.)

Q. Have you ever been a member of the Carpenters Union? A. Yes.

Q. When?

A. I don't remember when I joined. It was some years back, and I was until the fall of forty-seven at the time I was working with Mr. Heady. I was a member in good standing up to that time.

Q. What did you make out on the Post an hour when you were working out here? [23]

A. I believe it was a dollar and a half an hour.

Q. Did that include room and board, or did you pay for that? A. No, it did not.

Q. Down at Homer during the winter of forty-seven and the spring of forty-eight things were pretty high, weren't they?

A. I don't recall. I don't believe they were as high as they are now.

Q. Food was high and hard to get, wasn't it?

A. I don't know that it was.

Q. What would an ordinary dinner at six or seven o'clock at the restaurant they had at that time cost you?

A. I don't recall what it was.

Q. Would it be around two dollars?

A. I don't believe it would be that high.

Q. What about the noon day meal—at noon what would that cost you?

A. It would depend on what a person would eat.

Q. Can be from a dollar to five dollars?

A. Yes.

(Testimony of Lawrence E. Slavin.)

Q. And breakfast—do you remember what ham and eggs would cost?

A. I suppose a dollar or a dollar and a quarter, perhaps a dollar and a half.

Q. Would you say your board would cost you on an average of a dollar and a half a meal? [24]

A. No.

Q. You think it would cost a little less than that?

A. I think so.

The Court: Is there any objection to coming back at 1:30 this afternoon?

(No response.)

The Court: The trial will be continued to 1:30 and remember if anyone is late, of course, no business can be done until the absent person arrives. Oh, yes, before you go, it is my duty to instruct you, as you know. I think the law uses the word admonish. I admonish you that you must not discuss the case among yourselves, or with others, and you must not form or express an opinion until it is finally submitted to you. I don't like to repeat this every time we separate, but the law says it is my duty and so I must perform my duty in that regard. The Court will stand in recess until 1:30.

Afternoon Session

The Court: The Clerk may call the roll of the jury.

(Jurors names were called and responded to.)

The Clerk: Jury in the box, all present, your Honor.

The Court: Mr. Slavin may resume the stand and counsel may resume his examination.

LAWRENCE E. SLAVIN

plaintiff, previously called as a witness on behalf of said plaintiff [25] resumed the stand and testified as follows:

Cross-Examination

By Mr. Bell:

Q. How long did you work on the stairways?

A. That would be a hard thing to say definitely.

Q. Could you give us a good idea?

A. I believe there was other work came in at different times that it wasn't steady all the time.

Q. Did you work steady every day, or some days you didn't on account of material?

A. Very nearly every day and some Saturdays and Sundays.

Q. How come you only told the jury under your own counsel's examination that you worked an average of forty hours a week?

A. I thought that was fair enough to balance that up very easily.

Q. Some weeks then you worked more than forty hours? A. Yes.

Q. And some less? A. I don't believe so.

Q. You had your ground surveyed out in the country during that time? A. Yes.

Q. Were you out there some time when you were having that survey.

(Testimony of Lawrence E. Slavin.)

A. About a day and a half. [26]

Q. Did you work forty hours between Christmas and New Years? A. I couldn't say definitely.

Q. Sometimes you worked pretty steady, and sometimes you didn't?

A. I worked fairly steady all the time.

Q. The days were quite short? A. Yes.

Q. When did you first get the gasoline lantern you spoke about?

A. Practically right after we got the building enclosed.

Q. In January? A. No.

Q. December?

A. No, I would say November.

Q. Working inside there would only be a very small part of a winters day that you could see to work without artificial light?

A. That's right.

Q. Those lanterns—how many did you have?

A. Sometimes one, sometimes three.

Q. Did Mr. Heady work there too?

A. He was around too.

Q. This other gentleman—Tommy Wickland—he worked too, didn't he?

A. He never made it a practice of working [27] evenings.

Q. You didn't except on the stairway?

A. Yes, on the living quarters in order to rush through.

Q. When was about the last day you worked according to your best memory?

(Testimony of Lawrence E. Slavin.)

A. I would say about the last day of January, 1948, was the last day I really worked.

Q. The last day of January, 1948?

A. Yes.

Q. Why did you allege in your complaint that you didn't work beyond the 23rd of January?

A. I don't believe I alleged that.

Mr. Bell: May I see the original complaint. I want the original:

(The Clerk hands the original court file to Mr. Bell.)

Q. (By Mr. Bell): Mr. Slavin, look at that instrument there and see if that is your signature over on the second page? A. Yes, it is.

Q. Did you read that before you signed it?

A. I apparently did.

Q. You thought it was true at that time?

A. Yes.

Q. You swore to it? A. Yes.

Q. I will ask you to look in that and see [28] what day you allege in there you worked last?

A. I believe it was the 23rd. Just a moment, please. Yes.

Q. That is what you allege there?

A. Yes.

Q. You would be more familiar with the facts then than you are now? A. Apparently.

Q. When did you first employ Mr. McNealy, Attorney at Law, at Homer about this case?

A. He was at Seldovia.

(Testimony of Lawrence E. Slavin.)

Q. Well, when did you first employ him?

A. Sometime the latter part of June.

Q. What year?

A. This year. That was last year.

Q. Forty-nine? A. Yes.

Q. You were outside in January of 48?

A. February 5th, I believe.

Q. You stayed with the Headys until you went outside, didn't you? A. Yes.

Q. And you stayed at the same place and had the same bed that you had? A. Yes.

Q. They furnished your board? [29]

A. Yes.

Q. Did you ever move in the hotel with them?

A. In the spring after I came back from the outside.

Q. Did you pay them for your accommodations then?

A. I don't believe there was anything asked for that. They put up a couple of cots and we furnished our own mattresses.

Q. Who stayed there besides you?

A. My nephew.

Q. How long did you stay?

A. The first night I arrived I stayed with Tommy Wickland and would have continued staying with Tommy only Al told me a story about Tommy and invited me over there.

Q. He invited you? A. Yes.

Q. And your nephew came over with you?

(Testimony of Lawrence E. Slavin.)

A. Yes.

Q. How long did you stay?

A. I couldn't say exactly. I don't know just when we left to go fishing, sometime in May, I believe.

Q. And he never charged you anything for board?

A. No, he said Tommy Wickland didn't want me to stay at his place, and that is why he invited me over there.

Q. Did you ever talk to Tommy about it?

A. Yes.

Q. But you didn't at the time? [30]

A. No. It was just a story told me, and I couldn't see how I could go out and ask for any enmity.

Q. You were welcome at the hotel?

A. Yes.

Q. And you weren't there?

A. I found out later I was welcome at Tommy's.

Q. Now, I believe you stated in your complaint, in Paragraph II, "That on or about the 23rd day of January, 1948, this plaintiff and the said defendants talked together concerning the said work and skilled labor and the wages due therefor, but the defendants became evasive as to payment, first agreeing to transfer a certain sawmill by bill of sale to plaintiff, which they failed and neglected to do, and later agreeing to reimburse plaintiff either in cash or in kind for his skilled labor." Did you tell Mr. McNealy that?

(Testimony of Lawrence E. Slavin.)

A. I don't know where he would have gotten it if I hadn't told him.

Q. You did tell him? A. Yes.

Q. The day you swore to this was the 6th day of September, 1949. Did you understand that you swore to that at that time?

A. I take it that I did.

Q. I will ask you this—if you told him this, “That plaintiff worked as a carpenter for the defendants in the construction of defendants’ hotel over a period of sixteen forty [31] hour weeks from the second day of October, 1947, to the 23rd day of January, 1948, inclusive, at the special instance and request of the said defendants, and for the stipulated wage of two dollars per hour for each and every hour so worked by plaintiff”? Did you tell your attorney that?

A. There was something came up about the wages. I told him that was what I had been getting for prior work.

Q. At the special instance and request of the defendants and for the stipulated wage of two dollars per hour?

A. Is that all of that paragraph?

Q. Did you tell him that?

A. Is that what it is?

Mr. Bell: I was just reading it.

(Mr. Bell hands complaint to witness.)

The Witness: It was there, yes.

(Testimony of Lawrence E. Slavin.)

By Mr. Bell:

Q. You told Mr. McNealy that there was a stipulated amount of two dollars per hour to be paid you? A. That is what I asked.

Q. You told him that? A. Yes.

Q. Why did you tell the jury this morning that there was no stipulated amount, that you thought you were to get ordinary carpenters' wages?

A. That is what was mentioned. It didn't come out in just [32] those words, but he said he would pay me the going wage.

Q. Who said that?

A. That is what Al told me when we made the agreement prior to this.

Q. Prior to what?

A. The 23rd of January.

Q. That is the day you say you quit?

A. I didn't say I quit. That is all I am asking for. I stayed around there and worked around.

Q. You stayed around until sometime in February? A. Yes.

Q. They gave you board and room?

A. Yes.

Q. There wasn't any agreement for \$2 an hour?

A. I understood that if he was going to pay me wages that it would be at the going wage scale.

Q. You didn't have an agreement with Al as to \$2 per hour and there wasn't any statement about \$2 per hour?

A. I believe something came up, because he

(Testimony of Lawrence E. Slavin.)

asked what I was getting from Squeaky in Seldovia.

Q. That came up? A. I believe it did.

Q. Why did you tell the jury this morning that nothing like that took place?

A. You brought it to mind. [33]

Q. You had forgotten until you read this complaint? A. I don't recall.

Q. Did you read the reply that was filed in this case? A. Yes, I read it.

By the Reporter: Will you speak up, please.

The Court: Yes, please speak a little louder, so the jury can hear you.

The Witness: I will try to speak a little louder.

Q. You read that when you signed it, didn't you?

A. I don't know as I seen this when I signed the other.

Q. This is dated later—October 19th. You signed that, didn't you? A. This here?

Q. Yes. A. Where did I sign this?

Mr. McNealy: I object—

Mr. Bell: It is sworn to by Mr. McNealy.

Q. (By Mr. Bell): You say you saw this?

A. I suppose I read it over. I don't definitely remember it.

Q. Do you remember reading the answer that Mr. and Mrs. Heady filed in the case?

A. Yes, I believe so.

Q. You read that over? A. Yes. [34]

Q. Then after that this was filed in the case?

A. I don't remember seeing that.

(Testimony of Lawrence E. Slavin.)

Q. Here it says this, "Plaintiff denies each and every statement and allegation made by the defendants in this answer which is not in full accord and agreement with plaintiff's complaint, except only defendants' statement that 'no price for work was agreed upon' and in that plaintiff understood he was to have going carpenters' wages." Was Mr. McNealy authorized to make that statement for you? A. What do you mean?

Q. This part "no price for work was agreed upon" and in that plaintiff understood he was to have going carpenters' wages?

A. There had been talk of amounts.

Q. Did you tell Mr. McNealy you authorized him to file it that way?

A. I don't remember seeing that one before.

Q. Where were you in October of 1949?

A. I guess I was in Homer.

Q. And did you still live at Seldovia?

A. No.

Q. You lived up at Homer? A. Yes.

Q. Homer had been your home all the time?

A. Yes.

Q. You know how Mr. McNealy received the information to this [35] effect, "Plaintiff denies each and every statement and allegation made by the defendants in their answer which is not in full accord and agreement with plaintiff's complaint, except only defendants' statement that 'no price for work was agreed upon' and in that plaintiff understood he was to have going carpenters'

(Testimony of Lawrence E. Slavin.)

wages''? Now, which is true, were you to have going carpenters' wages, or were you to have a specified amount of \$2 per hour?

A. I don't believe it ever came to any definite amount. I don't remember.

Q. You don't remember having an agreement with Mr. Heady?

A. Prior to January 23rd there was other negotiations under way, and I don't believe there was anything of that kind.

The Court: The 23rd of what?

The Witness: January.

Q. I believe you testified awhile ago you had a specific agreement on the 2nd of October with Mr. Heady that you would be paid \$2 per hour. I withdraw that. Were you shown the complaint, and did you read it?

A. You showed it to me awhile ago.

Q. Did you testify to this, or that this in substance is true that plaintiff worked as a carpenter for the defendants in the construction of defendants' hotel over a period of sixteen forty-hour weeks from the 2nd day of October, 1947, to the 23rd day of January, 1948, inclusive, at the special instance [36] and request of the said defendants, and for the stipulated wage of two dollars per hour for each and every hour so worked by plaintiff? Now, was there any such agreement as that?

A. As far as work I was asked to do the work.

Q. Was there any such agreement as you al-

(Testimony of Lawrence E. Slavin.)

leged? A. Yes, it was pretty near the——

Q. Did Mr. Heady tell you that he would give you \$2 per hour for each and every hour you worked?

A. That is what I was led to understand.

Q. Was ever the words \$2 per hour mentioned?

Mr. Nesbett: I object——

A. Yes.

Mr. Nesbett: ——it is leading.

Mr. Bell: The witness answered.

A. Yes. I told him what I was getting at Squeaky Anderson's before I came there.

Q. Do you remember this being in your complaint, "and in addition to the said two dollars per hour, plaintiff was to receive board and lodging from defendants, which board was provided——

A. The board was provided.

Q. You knew that they made arrangements and furnished the bed for you to sleep on?

A. They furnished the bed, but not the linen. I furnished my own sheet blankets. [37]

Q. When was this agreement that you referred to entered into? That is that he was to give you \$2 per hour over and above board and room?

A. I couldn't say when.

Q. Was it in October, November, December, or January?

A. It was brought up during the time I were there.

Q. You also notice that this complaint says,

(Testimony of Lawrence E. Slavin.)

“plaintiff was to receive board and lodging from the defendants, which board was provided by the defendants.” You read that before you signed it?

A. Yes, if my signature is there I must have read it.

Q. On the 23rd day of January, 1948, did you have a conversation with Mr. and Mrs. Heady?

A. I wouldn't say as to Mrs. Heady.

Q. Did you with Mr. Heady?

A. Mr. Heady and me spoke every day.

Q. Did you have any agreement on the 23rd day of January about salary, or how you were to be paid?

A. At that time I presume——

Q. Not what you presumed. Did you have any conversation about salary that day?

A. That might have been the day we talked about it. We were comparing the sawmill with this work.

Q. What about the sawmill? Were you given a sawmill?

A. No. [38]

Q. Mr. Heady did give you a one-half interest in a sawmill?

A. No, I never did receive it, so how could he give it to me?

Q. Didn't you and Tommy Wickland own a sawmill?

A. No.

Q. Guy Waddel, I mean?

A. No.

Q. You did work out there?

A. Yes.

Q. You were outside and bought parts and sent them back?

A. Sent them back, yes.

(Testimony of Lawrence E. Slavin.)

Q. When you came back you and your nephew went out to the sawmill? A. Yes.

Q. How long did you work at the sawmill?

A. At that time and in June I probably put in close to three weeks.

Q. Who sent you out there?

A. I thought the deal would go through, but it didn't.

Q. I will ask you if you remember you and Mr. Heady having this conversation, or this in substance, after you had finished, or before you went away, Mr. Heady told you that he and this other gentleman had bought a sawmill and had been running it, and Mr. Heady had no further use for it?

A. Not in those words. [39]

Q. Similar to that.

A. If I can tell you what came up prior to this time.

Q. All right, you tell it your way.

A. Mr. Heady and Guy Waddel had a sawmill. I was interested in it and they wanted to sell it for two thousand dollars. One day Al and Guy was through and Al came to me and said he would give me that sawmill, but I couldn't take possession of the mill until the rest of his logs were sawed up. That was as the agreement stood, and on the strength of that agreement I bought parts for it. On coming back things didn't look right, and it appeared to me they was ruining the motor. Al couldn't produce the bill of sale for the sawmill,

(Testimony of Lawrence E. Slavin.)

and I told him I didn't want anything more to do with it.

Q. Did you ever ask Al for a bill of sale?

A. Yes.

Q. Where did you ask him?

A. I believe the last time anything came up about the bill of sale came up out in front of the hotel.

Q. Who was present? A. Just Al and me.

Q. What was said?

A. I told him I wouldn't have anything more to do with it. They was ruining the motor. I went fishing in July. When I came back, I would say about the 8th or 10th of August—two days later Al Heady left for the outside. He was gone some two months.

Q. Why, do you know?

A. For his health. On coming back some two months later I had a chance to meet him in front of the hotel, and we talked there. He says, "I hear Guy sold the sawmill." I said, "Yes, where does that leave me," or something to that effect. He said, "I can't do anything." I said Al I never got any bill of sale, and he said I can't produce a bill of sale, he never had one either and he considered me paid off for my work and he wasn't going to do anything more about it. I said I didn't consider it that way, and that is where the bill of sale business came up.

Q. While you had possession of the sawmill and

(Testimony of Lawrence E. Slavin.)

working on it was this other man out there with you? A. Part of the time.

Q. Did you run the sawmill some?

A. Yes, we sawed out several thousand feet of lumber before things came up to a head and I got out from under.

Q. What came to a head?

A. I told them they were ruining the motor and I didn't feel I could take over a sawmill with a ruined motor. It would cost me several hundred dollars, and Guy Waddel said he wouldn't put another dime into the sawmill, and I didn't think it left me in a very good position.

Q. Then the trouble came up between you and Guy Waddel? [41] A. No.

Q. Mr. Heady wasn't out there?

A. Yes, at the last. At first, while we were bucking logs, Al was up at Caribou Lake on a fishing trip. He had been up there some two weeks, and Guy wouldn't do anything about sawing the logs until Al came back. He knew at the time that the mill wasn't mine until the logs was sawed up. Then it came up about this motor, and I told Guy one day that the oil pressure was down, and he said his Plymouth did the same thing, that it was all right. Then one day they was throwing oil out of the front mains. I remarked about that to them, and Al said it was just an oil seal that was gone, so I figured that if he could produce the bill of sale I would get nothing but a wreck anyway.

Q. Didn't you in the presence of Mr. Heady and

(Testimony of Lawrence E. Slavin.)

four other persons have this conversation with Mr. Heady about the sawmill, Al said I will give you a bill of sale to my half interest as soon as we can get one fixed up, and you said I have four witnesses, I guess I am all right?

A. Never. Al claimed he didn't have a bill of sale.

Q. He said he didn't get one when he bought it?

A. Al acquired the motor, as I understand it, and Guy the sawmill.

Q. What kind of a motor?

A. TD-40 International. [42]

Q. Originally that would be a very good motor?

A. Originally, yes.

Q. How long would you think that it ran while you were around it and working with it?

A. That would be hard to say.

Q. Did it run 'til May?

A. It was never run steady very long. Just as they were sawing up these logs.

Q. Did you use it for anything other than sawing logs? A. No.

Q. You did saw up quite a lot of logs?

A. I helped. It was their logs, and Al was doing the sawing.

Q. Did Mr. Heady tell you that the mill had served it's purpose so far as he was concerned, that he just wanted it to saw logs and lumber to build the hotel? A. I couldn't say.

Q. Was there something like that?

A. I couldn't say definitely.

(Testimony of Lawrence E. Slavin.)

Q. I will ask you if he didn't say to you, "I will give you my half interest in that sawmill. It can serve no purpose to me, and it will be a benefit to you," and if you didn't say, "Well, it's just like a gift from God, you don't owe me anything, and I sure appreciate it"?

A. No, sir. Mrs. Heady wasn't there.

Q. I asked you if you didn't say that to Al? [43]

A. I don't recall the words.

Q. Did you say it was a gift from God?

A. No, I knew it wasn't.

Q. Or a gift from heaven? A. No.

Q. What were the words you said that it was just a gift? A. I didn't say it was a gift.

Q. What words did you use to Mr. Heady?

A. I said I would be satisfied with that arrangement.

Q. Didn't you add to that these words, "Al, you don't owe me anything, and I sure appreciate it"?

A. Maybe I said that after he gave me the sawmill, they wouldn't owe me.

Q. You got mad at Mr. Waddel?

A. I didn't get mad at him.

Q. You just thought he couldn't run a sawmill? A. He was a good sawmill man.

Q. Why did you quit there and go fishing?

A. I was intending to go fishing all the time.

Q. There was no trouble between you and Mr. Waddel? A. No.

Q. You just quit and went fishing?

(Testmony of Lawrence E. Slavin.)

A. After Al and I had the set-to I admit I couldn't see where I was coming out on the deal. I said they were ruining the sawmill. [44]

Q. Who were?

A. Between him and Guy. They was sawing the logs.

Q. When was that?

A. I don't remember the date. I can say where and when. We were sitting in the Yashure Bar. We were both having a few. There was some talk came up. It was the motor that was hurting me to see that good motor ruined, and especially if I was taking it over. I think it was the same day I drawed their attention to the oil leaked out the front main. Anyway it came up that evening and I had told them before there was something wrong with the motor. I admit it was a good motor, but it wasn't put together right in the first place, and they was using at that time outboard motor oil instead of diesel oil, so then my nephew and me took the head off it and found a broken rocker arm and two bent pushrods. That is enough to stop any motor from operating efficiently.

Q. What date did you take that apart and find that condition?

A. That was during the time that my nephew and me were staying at the hotel, in the spring after April 25th, or about that time.

Q. Did you fix that up?

A. No, I had to send for parts for it.

Q. Did they come?

(Testimony of Lawrence E. Slavin.)

A. They did while I was up on the beach fishing the first time. When I came back around the 1st of June they were there. [45]

Q. Did you put them in?

A. Yes, but still the motor wouldn't function.

Q. Who put them in for you? A. I did.

Q. Do you suppose you put them in right?

A. Yes.

Q. Did it run after you put those parts in?

A. About the same as it did before, because I found out later there was a broken nozzle chain, I believe is what they call it. I took that out and put in a new one. It was really over that that the set-to come later on, because when I was speaking to Al it came up about the broken rocker-arm and the bent push rod. He said, "You didn't find that. Hap found that." He is my nephew. Then when I told him about the broken chain he insinuated that I broke that when I took it out, so I told him he could keep his mill. There was no bill of sale and I didn't think it was my mill. They was still using it.

Q. Who was running the mill then?

A. Guy Waddel. I was on the off-bearing.

Q. For the sake of the jury what is that?

A. That is taking the slabs and boards away from the saw—the cut lumber.

Q. You stood then what would be behind the saw, or in front of the saw and after the work went by you picked it up and [46] carried it away?

A. Yes.

(Testimony of Lawrence E. Slavin.)

Q. And the same with the lumber?

A. Yes.

Q. How long did you do that?

A. I didn't keep track of the time. It was after Al came back from fishing. We might have worked four or five days, or a week.

Q. When did that mill last run so far as you know?

A. So far as I am definite of that is the last time. That is after they finished them logs. They run it after I left there.

Q. Did Guy Waddel continue to operate it when you were fishing? A. Yes.

Q. Was he operating it when you returned from fishing?

A. No, I believe by that time Guy had sold the sawmill.

Q. Do you know who Guy sold it to?

A. I believe a fellow by the name of Chuck Gregmier.

Q. Isn't it Quigmier? A. I don't know.

Q. Is he still operating the mill?

A. No, I think not. I think he has released it.

Q. Didn't that mill run last year?

A. As I say, the only time I definitely know of, any other [47] time——

Q. You knew that it was running all last year?

A. No.

Q. Is it still running? A. No.

Q. How do you know it isn't?

(Testimony of Lawrence E. Slavin.)

A. The man that is taking over, or leasing it from this Quigmier came to me two or three weeks ago, said he was going to take it over, and said he heard I was a little acquainted with the motor, and when he got to operating would I come down and show him what I knew about the motor.

Q. Did you tell him that you would?

A. I told him that Wayno Salo was a Diesel man and acquainted with those motors, and it would be better for him to get him, but if he was unsuccessful I would show him what little I knew.

Q. This Wayno Salo is a good Diesel engineer?

A. Pretty good. Best there is around.

Q. He had fixed the motor before?

A. As best he could with the material at hand.

Q. He is a better engineer than you?

A. Definitely. I go to him to find out.

Q. Mr. Quigmier—did you tell him you owned a half interest?

A. That transaction went through when I wasn't there.

Q. He leased it? [48]

A. I think he bought it. Al told me he bought it.

Q. Al told you to get around there and protect yourself?

A. No, he said Guy sold the sawmill and I would have to go fight it out with Guy.

Q. He told you it was your mill?

A. No, it wasn't my mill.

Q. It had been?

A. No, the agreement was that they finish his

(Testimony of Lawrence E. Slavin.)

sawing before. They never had finished his sawing.

Q. Didn't you help finish the sawing for him?

A. No.

Q. Whose lumber were you sawing?

A. Al's and Guys'.

Q. You finished that, didn't you? A. No.

Q. How do you know you didn't?

A. There was logs still there.

Q. You finished and went off?

A. If logs were there apparently I didn't finish.

Q. No, no, you went off to fish?

A. I told him there wasn't no use for me to stick around.

Q. When did you tell him that?

A. About the 20th of June.

Q. Whose logs were left?

A. Al Heady's and Guy's. [49]

Q. How do you know?

A. Take their word for it.

Q. Did they tell you that? A. Yes.

Q. Which one? A. Both of them.

Q. When did they tell you that?

A. That had been spoken of a number of times prior to this time of sawing. He left them in the fall until that fall, either five or ten thousand feet in the fall.

Q. What time?

A. I don't definitely know, maybe the 1st of December.

Q. In the fall of forty-seven? A. Yes.

(Testimony of Lawrence E. Slavin.)

Q. That was when you were staying at Mr. Heady's?

A. Yes. We sawed out the two by twelves that we used for stringers on the stairways.

Q. How did you go out there?

A. Riding with Al.

Q. In his truck? A. Yes, riding with Al.

Q. How many days do you think you worked up there at the sawmill? A. I don't know.

Q. As I understood you awhile ago when Al told you he was [50] going to give you his half interest in the sawmill you were very much pleased?

A. At that time.

Q. You did make some statement to him that you were very well pleased?

A. Yes, at that time.

Mr. Bell: That is all.

The Court: Any re-direct?

Redirect Examination

By Mr. McNealy:

Q. You have heard a little bit about a sawmill in this case, haven't you, Mr. Slavin?

A. That is correct.

Q. Will you state for the benefit of the Court and Jury who owns the sawmill now?

A. I don't definitely know, but I understand that this Quigmier.

Q. Did you ever get any money out of it?

A. Not a cent.

(Testimony of Lawrence E. Slavin.)

Q. Do you know that Guy Waddel and the defendant, or one of the defendants, Mr. Heady, sold the sawmill to a party by the name of Bruce two or three years ago?

A. Yes, I understood that.

Q. In other words, they had been selling this sawmill all over [51] the country down there?

A. Yes, sir.

Q. Answer this yes or no. Did Mr. Heady endeavor to dump this sawmill into your lap to pay you for your wages?

Mr. Bell: Object as incompetent, irrelevant and immaterial, not within the pleadings.

The Court: It may be irrelevant and immaterial, but it is not a proper question.

Q. Did you ever get a bill of sale to the mill?

Mr. Bell: Objected to. It has been asked and answered.

The Court: Only by answer to question put by counsel for defendants. Overruled.

A. No, I never did.

Q. Did you ever have possession of this sawmill? A. No.

Q. Now, on cross-examination it was brought out that you were sawing lumber with this sawmill. Who were you sawing the lumber for?

A. I wasn't sawing, merely helping, working there.

Q. Who paid you for that?

A. I never received anything but a few pieces of lumber.

(Testimony of Lawrence E. Slavin.)

Q. Will you explain to the jury how much lumber?

A. At the time I was helping them there in December I got three six by sixes twenty feet long, then sometime in the summer, in [52] June, I got eight two by fours twelve foot that Guy figured wasn't good enough to put in an order, and two two by twelves.

Q. That is all the pay you received for this work? A. Yes.

Q. Were you working for Guy Waddel then, or the defendant, Heady?

A. I was trying to work to get the sawmill clear so that I could take it over.

Q. Did you ever take the sawmill over?

Mr. Bell: Objection, calling for a conclusion.

The Court: Overruled.

A. No, never did.

Q. You don't have it now? A. No.

Q. Never have had it? A. Never have.

Q. Was it, or was it not your understanding at one time that you were to have this sawmill for your wages? A. Yes.

Q. Now the fact is that you did work for the Headys, did you not? A. Yes, I did.

Mr. Bell: Object to going into that.

The Court: That is covered in the examination in chief. The objection is sustained. [53]

Q. On cross-examination a party was brought up by the name of Tommy Wickland. Are you acquainted with Tommy Wickland? A. Yes.

(Testimony of Lawrence E. Slavin.)

Q. Did Tommy Wickland work on the Heady Hotel at the same time that you did? A. Yes.

Mr. Bell: I object. It is incompetent, irrelevant and immaterial.

The Court: The objection is sustained and the jury will ignore anything pertaining to this.

Mr. McNealy: May we have a few minutes recess at this time.

The Court: Court will stand in recess for ten minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present, and counsel may proceed with the examination.

LAWRENCE E. SLAVIN

plaintiff, testifies as follows on further

Redirect Examination

By Mr. McNealy:

Q. Mr. Slavin, on cross-examination you were sort of cut off on part of this conversation with the defendant, Mr. Heady, which took place at the Yashure Club. Will you complete that? [54]

A. As I say, we had both been having a few drinks, that is we was drinking together until this argument came up about the motor, and I told him then I didn't think I wanted to go through with it, that there was no bill of sale and they were ruining the motor and about the chain he accused me

(Testimony of Lawrence E. Slavin.)

of breaking it and I didn't like the accusation.

Q. Then you testified you had another conversation with Mr. Heady outside of the hotel when he came back from the outside will you complete that conversation.

A. I believe I very nearly covered all of that. He said I would have to settle it up with Guy, and I asked him at the time what right Guy had to sell the sawmill and he couldn't answer that, and when I came back from fishing Al was there and he never approached me saying he was through with the sawmill. Seems he turned it over to Guy and Guy done what he pleased with it, and that is what he told me there in front of the hotel that I would have to go see Guy for it that he considered he was straight with me and settled up.

Q. After that time did Mr. Heady offer you any other settlement? A. Yes.

Q. State what that was.

A. Last spring when I was working with Squeaky Anderson, Al was over there. He said could I come over sometime he would like to talk to me. I said yes I would that following Sunday, so I did. He had a planer out there that is in pretty bad shape.

The Court: What?

A. A planer, and he asked me if I would take that as part settlement on the deal, gave me to understand there was several would like to have it. I asked him how much. He said seven hundred dollars, and I said I couldn't see it in the planer, so

(Testimony of Lawrence E. Slavin.)

that fell through. At a later date I talked to Al to see if I couldn't get some kind of settlement and he said Guy is coming up for the spring bear hunt and we would talk. I don't know if he came for the spring hunt, but he did the fall hunt and I wasn't approached about anything.

Q. Was this planer offered as a part settlement, or full settlement?

A. I understood as part settlement.

Q. What was it offered for? This labor claim?

Mr. Bell: Object to him leading the witness.

The Court: Objection sustained. You can tell what was said.

Q. Was this planer offered as a seven hundred dollar payment on this twelve hundred dollar claim?

Mr. Bell: Object to that.

The Court: It is a leading question. After all, the jury is competent to draw the conclusion as to how it was offered. [56]

Q. Can you testify as to what you said and what Mr. Heady said? A. Pretty close, yes.

Q. If you will.

A. He says how about taking that planer as part settlement in the deal, that some other people was wanting it, but he would let me have it if I wanted it. I said how much. He said seven hundred dollars and I said no I wouldn't do that if he had a chance to sell it go ahead.

Q. Did this conversation take place after this sawmill situation? A. Yes, last spring.

Mr. McNealy: That is all.

(Testimony of Lawrence E. Slavin.)

The Court: Any further cross-examination?

Recross-Examination

By Mr. Bell:

Q. You testified——

The Court: Did you testify?

Q. Did you testify that Mr. Heady and this fellow, Waddel, sold this sawmill to somebody by the name of Bruce? A. Yes.

Q. That happened before you ever had anything to do with it. Three or four years ago?

A. Yes.

Q. Then they got it back from Mr. Bruce? [57]

A. Yes.

Q. That all took place before you were interested in any way? A. Yes.

Q. Now, you say you didn't take possession of the mill, but you did take Al's half?

A. No, I didn't receive it.

Q. You and Waddel were in possession?

A. No, not entirely. We was as to working it, but as far as owning it it wasn't mine yet.

Q. You bought parts for it and repaired it?

A. Yes.

Q. And you understood that you owned a one-half interest and that Waddel owned a one-half interest?

A. I was to receive a one-half interest as soon as they finished their sawing.

Q. Then you got mad at Waddel and went fishing? A. I did not get mad at Waddel.

(Testimony of Lawrence E. Slavin.)

Q. You complained about ruining the motor?

A. I complained about it. I thought it might be something he overlooked.

Q. All you ever figured you owned was Al's half interest?

A. I thought I would get that.

Q. You never figured to own Waddel's interest?

A. No.

Q. You never understood you would have Waddel's interest? [58]

A. Only in another deal with Guy.

Q. You and Guy made a deal where you were buying Guy's interest?

A. I would have liked to buy him out that same morning. I thought maybe I could get it for a thousand dollars and then this deal with Al, and get it all my own, that I could get some place with it by myself, but he wanted two thousand dollars for his half, and that was that.

Q. When was that?

A. Five o'clock in the morning.

Q. Were you drinking?

A. Not heavy, no.

Q. You had been drinking?

A. I had been drinking with the defendant that night.

Q. You did go up there at five o'clock and get Guy up?

A. I think he was awake. His wife was up.

Q. He was in bed?

A. Yes.

Q. You tried to buy his half interest in the mill?

A. I didn't make any offer. He said two thousand dollars and I seen I couldn't reach it.

(Testimony of Lawrence E. Slavin.)

Q. What did you do then?

A. I forgot about the deal.

Q. You went back to the Yashure Club and really did get drunk? [59]

A. I don't know, maybe I did. I don't think so.

Q. The night you were jumping on Mr. Heady in the Yashure Club you were plenty full then?

A. I think we were about neck and neck.

Q. You kinda got the start of him, didn't you?

A. I don't think so. I don't recall.

Q. What did you use this lumber for you took away?

A. The three six by sixes, well, they are all laying there on the place yet.

Q. You still have them? A. Yes.

Q. Out at your farm? A. Where I live.

Q. Out where you live now? A. Yes.

Mr. Bell: That is all.

The Court: Does the jury have any questions?

(No response.)

Mr. McNealy: We have no more witnesses, Your Honor.

Mr. Bell: Just for the record, Your Honor, we move to dismiss and to instruct the jury to return a verdict for the defendants.

The Court: Motion is denied.

Mr. Bell: Exception.

The Court: And the exception is noted. [60]

The Court: Witness may be called on behalf of defendants.

Mr. McCarrey: Call Mr. Heady.

ALFRED HEADY

called as a witness, having been first duly sworn,
testified as follows:

Direct Examination

By Mr. McCarrey:

Q. Your name is Alfred Heady?

A. Yes, sir.

Q. You are one of the defendants in this cause
of action of Larry Slavin versus Alfred Heady and
Esther Heady? A. Yes, sir.

Q. I will ask if you know Mr. Slavin?

A. Yes, sir.

Q. When did you first meet him?

A. About 1940 or '41.

Q. Where were you working?

A. At the Base.

Q. Work as carpenters together?

A. Together sometimes.

Q. What was Mr. Slavin doing?

A. He was doing carpenter work. We were
working mostly on form work.

Q. He was working on practically the same type
of work? [61]

Q. Did you have occasion to see Mr. Slavin on
or about the 2nd day of October, 1947, at Homer,
Alaska? A. Yes, sir.

Q. I will ask if you know what the circumstances
were in regard to that meeting?

A. When he came over from Seldovia he had

(Testimony of Alfred Heady.)

stopped at the building where Tommy Wickland was working. I don't know what he did. He said he helped him a little bit, and they came down to my place for dinner.

Q. Who is Tommy Wickland?

A. He is a gentleman that was helping me construct my building.

Q. Had you and Tommy Wickland ever worked together before? A. Yes, sir.

Q. As a matter of fact you and Mr. Wickland and Mr. Slavin worked together out here at the Post? A. Yes.

Q. How long has Mr. Wickland been a carpenter?

A. I couldn't say. To my knowledge 25 years.

Q. Anything else?

A. When I first knew him he was a builder in the states.

Q. What is your business?

A. I am a carpenter.

Q. How long have you been a carpenter?

A. Fifteen or twenty years. [62]

Q. Are you a finish carpenter?

A. Yes, sir.

Q. Can you do cabinet work?

A. Of course, cabinet work is different from carpenter work. I am not very good at cabinet work, but that is more like a trade of its own.

Q. Can Mr. Wickland do finish carpenter work?

A. Yes.

Q. Can Mr. Slavin do finish carpentry work?

A. Yes.

(Testimony of Alfred Heady.)

Q. Now, I believe you testified Mr. Slavin came over and had stopped off where Mr. Wickland was working at the hotel?

A. Yes, sir. To my knowledge it is.

Q. When did you first see Mr. Slavin that day?

A. When he came down to my home.

Q. When was that? A. Lunch time.

Q. Did you and Mr. Slavin have a conversation?

A. Yes.

Q. What?

A. He said I stopped up at the building and told Tommy to give me a hammer. Said I helped him put down some subflooring.

Q. What else?

A. He said, Al, I am going to be here for awhile and said [63] I would like to help up on your building. I said, Mr. Slavin, I would like to have you help me. I haven't any money though and we don't need you. Tommy and I can finish the building this winter, because material is so hard to get that we can't use you.

Q. What did he say?

A. He said so far as the money, Al, I don't want no money. Al, all I want is board and lodging, because I am going to be over here awhile and I just want to stay over here and be around with you all.

Q. You were all friends? A. Yes.

Q. What did you say?

A. I said, Larry, we don't have anything for you to do. We don't have material in often enough.

Q. Do you know the availability of materials at that time?

(Testimony of Alfred Heady.)

A. Yes, they were very hard to get.

Q. Where did you get your material?

A. Most from Palmer J. Lewis, Seattle.

Q. Did you have a supply of material on hand at the time Mr. Slavin came over?

A. Not very much lumber, but we did have some windows and doors.

Q. Were those framed together?

A. Yes. [64]

Q. They weren't in pieces?

A. As they ship them they come two windows together in their frames.

Q. Put together?

A. Not put together, in their frames. They come knocked down, too.

Q. Do you recall what the status of materials, aside from your windows, was at that time?

A. We didn't have practically anything.

Q. Coming back to the conversation, after you told Mr. Slavin you didn't have any money, and he said he just wanted to stay with you boys, what else was said?

A. I just told him I didn't have material and he couldn't help us out. I also told him Mr. Waddel owed me around a thousand dollars, that he had been down here a few different times and he would like to work it out on the building, which he was doing, but I couldn't use him nearly all the time.

Q. What did Mr. Slavin say to that?

A. I don't recall.

(Testimony of Alfred Heady.)

Q. What, if anything, took place after that?

A. He just seemed to stay around there.

Q. What hours were you working at that time, Mr. Heady?

A. Well, around that part of October I guess Tommy and me had been getting in around eight hour days, when we worked.

Q. Did you work every day? [65]

A. No.

Q. You didn't work every day?

A. No, not on the building.

Q. Did Mr. Slavin work every day when he was there? A. No, sir.

Q. What hours did Mr. Slavin work?

A. About the hours that we had until it got later in the season and the days so short, but in a building like that and no electricity we couldn't work long hours.

Q. Did he average forty hours a week?

A. No, sir.

Q. He didn't? A. No, sir.

Q. How many hours a week did he average, if you know?

A. I don't know. I didn't keep no time of the hours were worked.

Q. Why didn't you keep the hours?

A. I didn't hire him and didn't pay no attention to him being around there.

Q. Mr. Slavin did a pretty good job on the work he did do? A. Yes, he did.

(Testimony of Alfred Heady.)

Q. Did you hear Mr. Slavin testify to the fact that he wanted to put in the stairway?

A. Yes.

Q. Is that correct? [66]

A. Yes. He said, Al, I would like to put in that stairway. It was a stairway that makes a turn. Said he had always wanted to put one of those stairways in. I said all right if you are not going outside and want to stay around here.

Q. Did you work on Sundays? A. No.

Q. Did Mr. Slavin ever work on Sunday?

A. No.

Q. Did Mr. Wickland work on Sunday?

A. No, sir.

Q. Did you work Saturdays?

A. Occasionally, when we had material. Lots of Saturdays we didn't work.

Q. Did you hear Mr. Slavin testify he had his land surveyed? A. Yes.

Q. Do you know anything about that?

A. Nothing, only he borrowed my truck to go out and back.

Q. Do you know when he did that?

A. I believe that was in January, or just awhile before he went outside.

Q. That was after January 23rd, when he quit?

A. No, while he was staying with me and working around there.

Q. Did you work on Thanksgiving?

A. No.

Q. Did Mr. Slavin work on Thanksgiving? [67]

(Testimony of Alfred Heady.)

A. No.

Q. Where did you eat Thanksgiving dinner?

A. I believe at my home.

Q. Was Mr. Slavin one of your guests?

A. I believe he was there, yes.

Q. How many meals did he have a day when you were down there? A. Three meals.

Q. Did Mr. Slavin eat there all the time?

A. Almost every one. Every one when he was there.

Q. Did he ever complain of them?

A. Not to my knowledge.

Q. Did you work on Christmas? A. No.

Q. Did you work during Christmas week?

A. No.

Q. You did not? A. No.

Q. Did Mr. Wickland work that week?

A. No.

Q. Did Mr. Slavin work that week?

A. No.

Q. Did you work on New Years?

A. No.

Q. Did Mr. Slavin work on New Years?

A. No. [68]

Q. Did you have occasion to come to Anchorage during the first part of January, 1948?

A. Yes.

Q. Do you remember what time that was?

A. I don't just remember the date.

Q. Was Mr. Slavin working at that time?

(Testimony of Alfred Heady.)

A. He was there with Tommy. I don't know whether he was working or not.

Q. Was he working prior to the time you came to Anchorage?

A. Yes, when I had work, or there was work for him to do he was.

Q. What percentage of days during the time you were there did Mr. Slavin work, if you know?

A. I don't know, because I didn't pay any attention to his days, or what he did work.

Q. Now, did Mr. Slavin ever use your truck for other things?

A. Oh, yes, he used it when he wanted to.

Q. Did he ever use it for his own purpose during the time he was working for you?

A. He could use the truck at any time he wanted to.

Q. But just answer the question. Do you know whether it was on a Sunday, or a work day?

A. At different times.

Q. Did he stay away a day or two when he was using your truck? [69]

A. No, not that I recall.

Q. Calling your attention to the testimony Mr. Slavin gave pertaining to the sawmill, I will ask, if you recall, when that conversation took place, and who was present?

A. It was just before Larry got ready to go outside.

Q. While he was still working for you?

A. Yes, the last week, I think.

(Testimony of Alfred Heady.)

Q. Prior to January 23, 1948? A. Yes.

Q. Go ahead, please, Mr. Heady.

A. We were talking about this sawmill. Larry mentioned he would like to have a sawmill. He had mentioned it at other times, and I did know he was interested in a sawmill, so I told Larry, or Mr. Slavin, that if he would take the sawmill and run it, if it was agreeable with Mr. Waddel for him to take it, so we could have some lumber around there, I would like to see the sawmill run, for my own part, as well as the community, and I would give him that sawmill, or my half of that sawmill.

Q. What did Mr. Slavin say?

A. He seemed very pleased. Said it was just like a gift from heaven, says you don't owe me anything.

Q. Who was present at that time?

A. Mr. Wickland, Mr. Waddel, Mr. Beyer and Carley Beyer.

Q. Was Mrs. Heady present?

A. I don't recall whether—— [70]

Q. Was Mrs. Heady present at that time?

A. I don't recall whether she was present right at that time, or not, because she was in and out of the building so much.

Q. Did Mr. Waddel hear you make that statement to Mr. Slavin? A. Yes, sir.

Q. What, if anything, was said by Mr. Waddel?

Mr. Nesbett: Object to that.

The Court: Overruled.

A. Mr. Waddel was there and Mr. Slavin says,

(Testimony of Alfred Heady.)

“What do you think of that deal, will it be agreeable with you if I work with you if Al gives me a half interest in the mill?” and Mr. Waddel said yes he would like to have him for a partner, because he needed someone to help him run it.

Q. I believe you heard Mr. Slavin testify that he ordered some parts for the sawmill?

A. Yes.

Q. Do you know whether he did or not?

A. Yes.

Q. Was Mr. Waddel present at that time?

A. They discussed the parts that same day.

Q. It was perfectly agreeable with Mr. Waddel at that time? A. Yes.

Q. And also with Mr. Slavin?

A. Yes, sir. [71]

Q. Did you hear Mr. Slavin testify you would give him the sawmill as soon as he got the logs sawed?

A. Not exactly. The understanding at that time was that I gave it to him then. He asked me, or rather I asked him when he was down at my home about giving him the bill of sale. He said, “There are three or four present here, and I am not worrying about a bill of sale.”

Q. Has Mr. Slavin ever asked you for wages for the time he worked for you down there?

A. No, sir.

Q. Has he ever billed you at any time?

A. No, sir.

Q. Has he ever come up and asked, “Al, when

(Testimony of Alfred Heady.)

are you going to pay the wages that I worked for down there?" A. No, sir.

Q. When is the first time that you knew that Mr. Slavin expected money from you?

A. When he filed this lawsuit. No, about a week prior to that we had a notice from Mr. McNealy, or a letter, that Mr. Slavin was asking for wages.

Q. Did you ever answer that notice?

A. Yes.

Q. What did you say?

A. We answered we didn't think we owed Mr. Slavin wages, because we never hired him. [72]

Q. Did you give Mr. McNealy that notice?

A. We mailed a letter to him.

Q. Did you ever have a reply to your letter?

A. No.

Q. The first you heard after that was when you were served with summons and complaint?

A. That is right.

Q. Did you hear Mr. Slavin mention a planer on his examination? A. Yes.

Q. Tell about that, if you please.

A. Mr. Slavin built him a carpenter shop, and I asked if he would like to buy that planer for his carpenter shop.

Q. When was this?

A. Sometime last summer.

Q. Do you recall what month?

A. No, I do not.

Q. Who was present at the time?

(Testimony of Alfred Heady.)

A. I don't believe there was anyone other than Mr. Slavin and myself.

Q. What did Mr. Slavin say?

A. He asked how much I wanted for it.

Q. What did you tell him?

A. Seven hundred dollars.

Q. What did he say? [73]

A. He thought it was too much.

Q. Did you offer him the planer for wages that you felt you owed him? A. No, sir.

Q. Did you ever have another conversation with Mr. Slavin about the planer? A. No, sir.

Q. Did you hear Mr. Slavin testify that he had a conversation with you over at Seldovia?

A. Yes.

Q. Did you have such a conversation with Mr. Slavin?

A. Not regarding the planer. I talked to him over there.

Q. Did you at that time state that you wanted to see him?

A. Not to my knowledge. I don't remember ever saying that.

Q. Is it your testimony that you did not ask Mr. Slavin to come over to Homer to see you?

A. Yes.

Q. Now, Mr. Heady, did you ever have a discussion, or a conversation with Mr. Slavin, that you would pay him two dollars an hour and give him room and board? A. No, sir.

Q. Did you ever have a discussion with him at

(Testimony of Alfred Heady.)

any time that you would pay him for the work done there? A. No, sir.

Q. What was the prevailing carpenters wages at Homer at that [74] time, if you know?

A. I don't really know. There is no carpenters union there and I don't know.

Q. Do you know what the carpenters were being paid there in Homer?

Mr. Nesbett: Object to that, your Honor.

The Court: I think the witness may answer.

A. I don't know what the scale was there. There was very few carpenters there.

Q. Did you have anybody else help you on the hotel, other than Mr. Wickland?

A. Not as a carpenter. Mr. Waddel wasn't a carpenter, but he was pretty good.

Q. Did you pay him anything for his work?

A. I allowed him a dollar and a half an hour.

Q. And board? A. No.

Q. What did you make here at the Base?

A. Dollar and a half an hour.

Q. And board? A. No.

Q. Board was extra? A. Yes, sir.

Q. What were the conditions in the fall of '47 as to employment? [75]

A. It was pretty bad.

Q. What were conditions, if you know, as to the economics of Homer in the fall of '47?

A. I wouldn't say they were good.

Q. As a matter of fact the road hadn't been completed? A. No.

(Testimony of Alfred Heady.)

Q. Wasn't completed until last fall?

A. No, sir.

Q. Had the dock been completed at that time?

A. No.

Q. As a matter of fact, Homer was in a very bad financial condition at that time?

Mr. McNealy: Objection. That is a leading question. I think counsel is doing the testifying now.

The Court: In other civilized countries leading questions are allowed, but our rule is——

Mr. McCarrey: Very well, your Honor.

Q. (By Mr. McCarrey): Did you hear Mr. Slavin testify in regard to the conversation with you outside the hotel pertaining to the sawmill?

A. Yes, sir.

Q. What are the facts as you recall it?

A. He asked me something about the sawmill, and I said Larry I thought that was all settled, that you and Mr. Waddel was operating that sawmill, and I don't remember what else was [76] said—not much.

Q. Did he say anything about the bill of sale at that time? A. No, it wasn't mentioned.

Q. You remember anything else that was said in that conversation? A. No.

Q. Did you hear Mr. Slavin testify that you had purchased the engine and Mr. Waddel had the other part of the sawmill? A. Yes, sir.

Q. Is that correct?

A. Part is. When I went in partnership with Mr. Waddel this engine had all new parts for it,

(Testimony of Alfred Heady.)

but they had never been put together. There was supposed to be a new head, the block for the engine there. When we got a mechanic out there to put it together the block wasn't there, so we had to order a new one.

Q. Did you order a new one?

A. We did order a new one. I paid for the parts to fix the engine up to put it back together and the other money that I spent cash is how I bought the half interest in the sawmill.

Q. Do you know how much you spent for that interest?

A. Between a thousand and twelve hundred dollars. I don't remember just exactly what it was.

Q. I will ask if you heard Mr. Slavin testify about a conversation he had with you down at the Yashure Club? [77]

A. Yes, sir.

Q. Do you recall that conversation?

A. Yes, sir.

Q. Tell what you understood it to be?

A. I went into the Yashure Club. Mr. Slavin was there. Yes, I had a beer, or a drink, with him. I believe it was beer with him. The talk came up about this engine. He told me the engine wouldn't run, there was something wrong, and I said I don't know, Larry, when we closed it down last fall it was running. He said it isn't running now, that he and his nephew had been out there working on it, said there was a rocker arm broken and nozzle broken. I said maybe you broke that nozzle and he got kinda mad, and said I will give you the sawmill

(Testimony of Alfred Heady.)

back, and I said no, Larry, I gave you the sawmill, and if you don't want the sawmill you go talk to Mr. Waddel about it.

Q. Did you hear Mr. Slavin testify that he had gone up to the sawmill and was working with you and Mr. Waddel sawing logs in the spring of 1948?

A. Yes, sir.

Q. Had you obtained all of your logs prior to the time Mr. Slavin left the sawmill?

A. Yes, mine were. Mr. Waddel had a few more to be sawed, he and Ted Hershey.

Q. Did Mr. Slavin stay on after you got all of your logs out?

A. Yes, I believe he did. I had practically all my logs [78] sawed when I delivered my interest over to him.

Q. Do you remember how many thousand feet left to saw?

A. Just a few house logs of my own, I think.

Q. The balance were for Mr. Waddel and Mr. Hershey?

A. They were their logs. I think Mr. Hershey was having Mr. Waddel saw some out for him, but they didn't belong to me.

Q. Did you ever take possession of the sawmill after you had given it to Mr. Slavin?

A. No, sir.

Q. And haven't to this date? A. No, sir.

Q. Did you ever receive any money from the sale of the sawmill to someone else?

A. At one time.

(Testimony of Alfred Heady.)

Q. But that was before? A. Yes.

Q. And not after this time when you gave it to Mr. Slavin? A. No, sir.

Q. When you sold it before you gave it to Mr. Slavin how long was that before?

A. Something like two years.

Q. Two years prior to the time you gave it to Mr. Slavin? A. Yes, sir.

Mr. McCarrey: That is all.

The Court: We will recess now for ten minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present, and counsel for plaintiff may examine the witness.

ALFRED HEADY

one of the defendants herein, testifies as follows on

Cross-Examination

By Mr. Nesbett:

Q. Mr. Heady, did you state you were a finish carpenter? A. Yes.

Q. Did you come to Alaska in '40 or '41?

A. Yes, sir.

Q. You met Mr. Slavin at that time at the Fort?

A. Yes, sir.

Q. Prior to that time your employment in the states had all been as a rigger? A. No, sir.

Q. Had you worked as a carpenter?

A. Yes, sir.

(Testimony of Alfred Heady.)

Q. As a finish carpenter? A. Yes, sir.

Q. Did you do any finish carpenter work on this hotel in Homer? A. Yes, sir.

Q. What part did you do? [80]

A. On the insulation.

Q. Was Tommy Wickland a finish carpenter?

A. Yes, sir.

Q. Did he do any work of that nature for you?

A. Yes, on the ceilings.

Q. Did you do any other finish work here?

A. Yes, putting in the stairways.

Q. You helped on that?

A. I worked as a finish carpenter.

Q. With respect to the conversation with Mr. Slavin on October 2nd, I believe you stated, I don't have any materials on hand to keep you working?

A. Yes, sir.

Q. What request had he made when you made that statement?

A. That he was just going to help us out for his board and room.

Q. Did he say for his board and room?

A. Yes, sir.

Q. He had just come from Seldovia at that time?

A. Yes, sir.

Q. Did he have his tools with him?

A. I don't believe he did.

Q. He said he would stay around and help you boys for awhile? A. I believe he did.

Q. Then he was going to get his land surveyed and go on outside? [81] A. Yes, sir.

(Testimony of Alfred Heady.)

Q. You say you had no materials on hand to keep him busy?

A. Didn't have materials on hand to keep ourselves busy.

Q. What material did you have on hand?

A. Some windows and doors.

Q. You had all the windows and doors?

A. I don't believe I did.

Q. You could have had them all?

A. I don't think so.

Q. You had most of them?

A. As I remember, most of them.

Q. You had about two thousand feet of Celotex, didn't you?

A. I don't recall how much Celotex.

Q. You could have had that much Celotex?

A. Oh, yes.

Q. And you had most of the shiplap for the subfloors?

A. The subfloors were practically all in.

Q. What is the inside of that building—the dimensions?

A. About twenty-eight feet by eighty—a little over eighty.

Q. You had enough subflooring to finish the subfloors at the time Mr. Slavin arrived on the scene?

A. That is right.

Q. You had enough, including the amount you got from Mr. Tom Shelford? [82]

A. I believe that is right.

(Testimony of Alfred Heady.)

Q. Did Mr. Slavin say how long he would like to stay around with you boys? A. No.

Q. You knew he had worked for the cannery that spring and summer?

A. I didn't know that he had worked for them. I knew he was over there, had seen him over there.

Q. He told you he was working for Squeaky?

A. I don't know that he did.

Q. You knew that he had worked for Squeaky?

A. No.

Q. Did he say he was broke and would just like to have his room and board while he killed some time around Homer?

A. No, sir. I told him that we didn't need him, that we didn't want him to work for us.

Q. Why did you tell him that?

A. Because we didn't need him.

Q. I believe you said that was because you didn't have materials?

A. Not enough to keep one man going.

Q. Did he use those materials on the job while he worked for you? A. Some of them.

Q. When did Mr. Slavin get his tools over, if you recall? [83] A. How did he get them?

Q. No, when?

A. I don't know when he did get them.

Q. It could have been the following Friday after he arrived? A. Possibly.

Q. He did bring them over and use them in his work for you right through to January 23rd, if that was the date?

(Testimony of Alfred Heady.)

A. I think he left them there all winter.

Q. Now, is it your testimony that from October 2nd to the end of January that no discussion as to wages was ever had between you and Mr. Slavin?

A. Wages?

Q. Yes. A. No, sir.

Q. Do you deny any discussion was ever had with Mr. Slavin in regard to the amount paid him while working for Squeaky Anderson?

A. No.

Q. You don't know what he received there from Squeaky? A. No.

Q. You did know, however, that Mr. Slavin had a substantial bank account and money in his pocket at the time he arrived in Homer on October 2nd?

A. No, I don't know that.

Q. You didn't give him any money all the time he stayed there [84] in Homer, did you?

A. No, sir.

Q. You didn't keep any time that Mr. Slavin worked? A. Why, no.

Q. Did you keep any time that Tommy Wickland worked? A. No, sir.

Q. How long did Tommy Wickland work on the construction of that hotel?

A. He still helps me some.

Q. I know, but how long did he work steady?

A. Close to eighteen months, but it wasn't steady, or I mean not straight work.

Q. Was he just working for his board and room?

A. No, sir.

(Testimony of Alfred Heady.)

Q. Have you paid him?

A. I have paid him almost all of it.

Q. As a matter of fact, you have only paid him a hundred dollars? A. No, sir.

Q. How much have you paid him?

Mr. Bell: Your Honor, I object. It's incompetent, irrelevant, immaterial and prejudicial.

The Court: The objection is sustained?

Q. He isn't there with you now steady?

A. Working? [85]

Q. Yes. A. No, he just eats with us.

Q. Did you ever tell Mr. Slavin that you would like to have him build the stairway in that hotel?

A. No.

Q. Did he just say I would just love to do it, Al, please let me build it?

A. He said he would like to do it for the experience.

Q. Did you help on that? A. Yes, some.

Q. You were outside most of the six weeks that Mr. Slavin was first there?

A. Not all the time.

Q. A good part of it?

A. No, I wouldn't say that.

Q. Half the time? A. No.

Q. A third of the time? A. Possibly.

Q. What were you doing the other two-thirds of the time, working steady?

A. Tommy and I come over to the building and worked when there was material.

(Testimony of Alfred Heady.)

Q. Did you at any time run out of material while Mr. Slavin was there? [86]

A. Some types of material.

Q. There was always some types?

A. No, not all the time.

Q. Can you state a time when you had to stop for want of materials?

A. Quite a few times.

Q. Did you hang any windows in that hotel?

A. No, sir.

Q. Mr. Slavin hung them all?

A. I don't recall him hanging them all.

Q. He could have? A. Possibly.

Q. Do you know how many there are?

A. Not off hand I don't.

Q. Could you look at this exhibit and state?

A. If I could count them.

Q. Plaintiff's Exhibit No. 1.

(Mr. Nesbett hands the exhibit to the witness.)

The Court: The witness has examined the exhibit.

Q. (By Mr. Nesbett): Can you state?

A. There is around twenty-eight.

Q. Twenty-eight what? A. Windows.

Q. Are they all double windows? [87]

A. No, just the downstairs are double.

Q. How many doubles?

A. I will have to count those. About twelve here, I believe.

(Testimony of Alfred Heady.)

Q. About twelve doubles downstairs?

A. Yes.

Q. And the balance are single upstairs?

A. Yes.

Q. Any in the basement?

A. The basement windows was in.

Q. Who hung the outside doors, Mr. Heady?

A. Mr. Slavin and Mr. Wickland.

Q. Mr. Slavin did a pretty good job on all the work he did for you? A. Yes.

Q. He built the stairway inside by himself?

A. No, I helped him, and Tommy helped him at times.

Q. Any percentage of time come to your mind that you spent on those stairways?

A. No, I couldn't say.

Q. The main stairway comes down and branches out into two parts of the hotel?

A. No, one leading to the lobby and the other in the dining room.

Q. There are two separate stairways?

A. That is right. [88]

Q. And then one from the dining room down into the basement?

A. Well, it isn't finished up.

Q. You can use it as a stairway.

A. Oh, yes, we get over it.

Q. Did you ever pay Mr. Slavin the cost of sharpening his saws while he was working for you there?

A. I had Mr. Slavin's saws filed myself.

(Testimony of Alfred Heady.)

Q. Did you pay for it? A. Yes, sir.

Q. You are positive of that? A. Yes, sir.

Q. I believe you testified, did you not, that sometime after January 23rd you had a conversation with Mr. Slavin that you would give him that sawmill? A. I did.

Q. And at that conversation there was present Mr. Tommy Wickland? A. Yes.

Q. Mr. Beyer of Homer? A. Yes, sir.

Q. And another Beyer? A. Yes, sir.

Q. And Mr. Waddel? A. Yes, sir.

Q. Where was that conversation had—in the hotel? [89] A. In the building, yes.

Q. Where in the building?

A. Up on the second floor.

Q. How did that conversation happen to arise?

A. Just through a discussion or talk.

Q. Did you say, “Larry, I know you would like to own a sawmill. I am going to give you mine?”

A. We were talking about this sawmill. Larry had always said he wanted a sawmill. That is when I told him that if he would take the sawmill I was finished and had no further use for it—had no further use for the sawmill that I would give him my interest.

Q. Why did you give it to Larry rather than to your partner, Mr. Waddel?

A. It takes two to run a sawmill and I thought Mr. Slavin would make a good partner and the two could work together.

(Testimony of Alfred Heady.)

Q. You didn't offer him your sawmill because you thought you owed him something?

A. No, sir.

Q. If he had asked you for wages at that time what would you have told him?

A. Told him I didn't owe him anything.

Q. Not a cent? A. Not a cent.

Q. Mr. Wickland is in Homer? [90]

A. Yes.

Q. Mr. Beyer is in Homer?

(No response.)

Q. Carley Beyer?

A. No, he is in Chicago.

Q. Are they going to testify here?

A. I don't know.

Q. Have you subpoenaed them?

A. No, sir.

Q. Now, who is Mr. Hershey?

A. Ted Hershey. He is dead now. He lived in Homer.

Q. He had some lumber sawed over at the sawmill owned by you and Mr. Waddel?

A. He had some lumber cut after I got mine cut and gave my half interest to Mr. Slavin.

Q. At the time you say you gave your half interest to him you still had some lumber to be cut?

A. Possibly fifteen or twenty house logs. We saw them on three sides, six by six. That is all I had to saw, maybe half a day's work—half a day's sawing.

(Testimony of Alfred Heady.)

Q. Now, was Mr. Hershey having some logs sawed?

A. Mr. Waddel was sawing some logs for him.

Q. The deal was that you, Mr. Waddel and Mr. Hershey all had to have some logs cut, and you were pooling this, wasn't that the agreement? [91]

A. No, sir.

Q. You are positive of that? A. Yes, sir.

Q. You had all your logs out of there while they were still working on Mr. Hershey's logs?

A. Hershey didn't have any there only what was given to him.

Q. You had no logs on the site at all?

A. Just those few.

Q. Hadn't you spent about a week or ten days around the mill before you went up to Caribou Lake? A. I was just helping Guy.

Q. How much time did you spend around the mill when you came back from Caribou Lake?

A. Very little.

Q. How long, if you can recall?

A. Possibly a week.

Q. What were you doing during that week?

A. You mean at the mill?

Q. Yes. A. Just helping on the mill.

Q. Helping Guy saw?

A. Just helping him out.

Q. Mr. Slavin left before you left?

A. No.

Q. You came on back to Homer? [92]

A. Yes, sir.

(Testimony of Alfred Heady.)

Q. You had all your logs left and were finished there so far as your hotel was concerned?

A. I had left them, it was the year before.

Q. You needed no more?

A. I could use more if I could buy it.

Q. Were you willing to buy it from Waddel and Slavin even though you could give him the mill free of charge?

A. Any that the mill could saw. I couldn't use rough lumber in my building.

Q. You would buy this from them just so the mill could run as a community benefit?

A. That is right.

Q. When you offered to give him this sawmill you had no more lumber to come from that mill?

A. Just these logs that were to come out in the spring.

Q. Then when Mr. Slavin testified you were to get about fifteen to twenty thousand feet yet with respect to you and Waddel he was not telling the truth?

Mr. Bell: Objection as something that is not in evidence.

The Court: If Mr. Slavin so testified.

Q. (By Mr. Nesbett): Then if he did. The answer was?

A. Yes, that he wasn't telling the truth. [93]

Q. Then it is also your testimony, Mr. Heady, that Mr. Slavin never at any time requested wages from you until you received this letter from Mr. McNealy last year?

A. That is right.

(Testimony of Alfred Heady.)

Q. It was never discussed between you?

A. No.

Q. Have you still got that planer?

A. Yes.

Q. At the time you discussed that planer with Mr. Slavin the question of any money due him was never raised between you? A. No.

Q. Your testimony, I believe, then is that you offered to sell it to him for seven hundred dollars?

A. That is right.

Q. For cash?

A. It didn't get that far along.

Q. What did he say?

A. As I recall it he said it was too high.

Q. And no discussion with regard to wages at that time? A. No.

Q. About what date was that?

A. I don't recall.

Q. In the spring?

A. In the spring or summer, somewhere in there.

Q. Was that conversation held at the Heady Hotel? [94] A. Yes, not in it.

Q. In front of it? A. That is right.

Q. Who brought the subject up, Mr. Slavin, or you?

A. I guess I was the one that asked if he would like to buy it.

Q. What was the conversation just prior to you making that request of him?

A. I don't recall what it was.

(Testimony of Alfred Heady.)

Q. About when did you see, or rather did you deny that you had seen Mr. Slavin in Seldovia? I am questioning you about his testimony where he says you asked him to come over.

A. Well, yes, in respect to coming over, but I did meet him over there and talked to him.

Q. Did you see him a few days later in Homer?

A. Not a few days.

Q. How many?

A. I don't remember how long it was after that.

Q. Was that when you talked to him about the planer?

A. When he did come over?

Q. Yes.

A. Yes.

Q. Did you have an idea of selling the planer when you saw him over in Seldovia?

A. The fact is that the planer has been for sale for sometime. [95]

Q. How long?

A. At least a year.

Q. Mr. Heady, do you know what the rate scale was in the fall of '47 and early '48?

A. No, I don't.

Q. Where you were in '40 and '41, with Mr. Slavin, you got a dollar and a half an hour, I believe you testified?

A. I left there, I believe, in '43.

Q. You were working ten-hour days out there then?

A. Some of the time we were working ten-hour days, but as I recall it we worked most of the time eight hours.

(Testimony of Alfred Heady.)

Q. On the ten-hour days you received pay for the extra two hours?

A. I don't recall. We must have got overtime.

Q. The hotel is open to the public now, isn't it, Mr. Heady? A. Yes.

Q. How many rooms do you have?

A. We have twelve rooms upstairs on the second floor.

Q. Do you have any on the first floor?

A. No, just the lobby.

Q. How many guests will those twelve rooms accommodate?

Mr. Bell: Objection. Improper cross-examination and taking time.

The Court: Sustained. [96]

Q. Do you know where Guy Waddel is now?

A. Well, I do and I don't. His address was Grants Pass, Oregon, but he was supposed to be on his way back to Alaska now.

Q. Do you know when he sold that sawmill to Mr. Quigmier, is that who owns it now?

Mr. Bell: Object to that. No evidence——

The Court: There was some evidence to that effect. Overruled.

A. I don't know that the sawmill was sold.

Q. When did you last see Mr. Waddel?

A. He was through Homer sometime in the winter.

Q. This last winter?

A. Yes. It has been sometime ago.

(Testimony of Alfred Heady.)

Q. But you don't know whether he has actually sold the sawmill, or not. A. No.

Q. Do you know whether it was operated last summer? A. Yes, it was operated.

Q. Do you know the status of the sawmill now? Has Quigmier left it?

A. Not that I know of.

Q. When you saw Waddel did you discuss the sawmill with him to learn whether or not it had been sold? A. No, I didn't. [97]

Mr. Nesbett: I believe that is all.

The Court: Any further direct examination?

Mr. McCarrey: Just a few questions, your Honor.

Redirect Examination

By Mr. McCarrey:

Q. Mr. Heady, I will ask you, if you know, how much work it was to putting in the window casings? How much time would it consume, if you know?

A. Just to set them in and tie them in it wouldn't take over, I believe, possibly a week.

Q. That is for all of them?

A. That is not finishing the casing, but as they were put in during the winter.

Q. Did Mr. Slavin finish the casings?

A. Not all of them, no.

The Court: Any further questions — further cross-examination?

(No response.)

(Testimony of Alfred Heady.)

The Court: Have the members of the jury any questions?

Juror Tom Kovac: How far is that sawmill from your hotel?

The Witness: Around two miles.

Juror Alfred M. Lee: You said that Mr. Waddel helped you in some carpenter work, didn't you?

The Witness: Yes. [98]

Juror Alfred M. Lee: Did you keep a record of his time?

The Witness: Yes.

Juror Alfred M. Lee: Thank you.

The Court: Counsel for plaintiff wishes to——

Recross Examination

By Mr. Nesbett:

Q. Mr. Waddel at the time was working off a one thousand dollar debt, wasn't he, to you?

A. It was around a thousand dollars, yes.

ESTHER HEADY

called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination

By Mr. McCarrey:

Q. Your name is Esther Heady? A. Yes.

Q. You are one of the defendants in this cause of action of Larry Slavin versus Alfred Heady and Ether Heady? A. Yes.

(Testimony of Esther Heady.)

Q. I will ask if you recall the conversation had between Mr. Slavin and Mr. Heady about the 2nd of October, 1947? A. Yes.

Q. Who was present?

A. It was right at lunch time, we three and Tommy Wickland.

Q. What, if anything, was said then? [99]

A. Mr. Slavin came in with Tommy, said he had worked a couple of hours, and that he would be here a couple of weeks before leaving for the outside and was going to help them on the building just for his room and board.

Q. What, if anything, was said in reply to that?

A. Mr. Heady and I both told him at that time that there was no work there for him and didn't encourage him to stay.

Q. Was there anything else said at that time?

A. Nothing.

Q. Did Mr. Heady say he didn't have any money to pay him?

A. Yes, Mr. Heady did then and I mentioned it to him later.

Q. Mr. Heady mentioned it? A. Yes.

Q. What was said?

A. That he had no money to pay him and there wasn't enough material to keep him and Tommy busy.

Q. Did Mr. Slavin board with you?

A. Yes.

Q. How long did he board with you?

A. All the time until he went outside.

(Testimony of Esther Heady.)

Q. Did he ever complain about his board?

A. No.

Q. Did he eat all of his meals there?

A. Yes.

Q. Did you hear Mr. Slavin testify he had his own bedding [100] and did his own washing?

A. Yes. I didn't do his washing for him until we moved down to the hotel.

Q. Did you help him at this time with his washing?

A. Yes, he washed with the family wash.

Q. Did you help him do his blanket sheets?

A. Yes.

Q. Did you help him make his bed over there?

A. They usually made their own beds. Sometimes I changed the beds.

Q. What hours did Mr. Heady, Mr. Slavin and Mr. Wickland work while he was there?

A. They didn't work regular hours.

Q. How many days? How did they work?

A. I don't know. They didn't work any steady time and never on Sundays.

Q. Did they work the week of Christmas?

A. No.

Q. Are you sure of that? A. Yes.

Q. How do you know that?

A. Because they got on my nerves. I did and they didn't.

Q. Did they work on New Years? A. No.

Q. I believe Mr. Heady came to Anchorage sometime during the [101] early part of January?

(Testimony of Esther Heady.)

A. Yes.

Q. Did he? A. Yes.

Q. Did Mr. Slavin work while Mr. Heady was in Anchorage?

A. At that time he was getting his land surveyed, because he was going to sell it in lots, and he had a man interested and he took him out several times.

Q. How many days was Mr. Heady in Anchorage if you recall? A. Close to a week.

Q. During this period of time that Mr. Slavin was having his homestead surveyed did he work?

A. I know he was drawing maps and going out to the homestead quite a bit.

Q. How do you know Mr. Slavin was drawing maps? A. It was there at the hotel.

Q. Did you see them? A. Yes.

Q. Where were they drawing them?

A. I don't know. The hotel was so open then, I don't know.

Q. What time of day were they drawing those maps? A. During the day.

Q. You are sure it wasn't at night?

A. No, it was during the day.

Q. Has Mr. Slavin ever made demand upon you for these purported wages. [102] A. No.

Q. I will ask you whether or not, if you know, he has ever made demand on Mr. Heady?

A. No.

Q. I will ask you if you know whether or not Mr. Slavin worked for you and Mr. Heady sixteen

(Testimony of Esther Heady.)

weeks of forty hours each between October 2, 1947, and January 23, 1948?

Mr. Nesbett: Objection.

The Court: Overruled.

A. What was the question?

Q. Did Mr. Slavin work for you and Mr. Heady sixteen weeks of forty hours each between October 2, 1947, and January 23, 1948?

A. No, sir.

Q. You are sure of that? A. Yes.

Mr. McCarrey: That is all.

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. Nesbett:

Q. You are positive he didn't work sixteen forty hour weeks during the period covered here, Mrs. Heady? A. Yes.

Q. How can you be sure? [103]

A. There was so much of the time there wasn't any work going on at the building.

Q. The sum total of your statement is that you don't think he put in that much time?

A. I don't think he did?

Q. Yes.

A. I know he didn't. That would be practically a full shift every day, and they worked short shifts and days they didn't work at all.

(Testimony of Esther Heady.)

Q. There was days when he worked at night?

A. No.

Q. Your testimony is that he didn't work at night by lamp light?

A. He didn't that I know of.

Q. You heard Mr. Slavin testify that on occasions they did work by lamp light?

Mr. Bell: Object to that. She can testify——

A. I don't believe they did. I know they didn't when I was at the building.

Q. You didn't get into the building until Christmas Eve wasn't it? A. Yes.

Q. Mr. Slavin helped you and your husband move all your gear over from your house?

A. I believe he did. [104]

Q. You were all working frantically to get the building ready for occupancy before the real cold weather set in?

A. They worked whenever they had material.

Q. You say Mr. Heady didn't encourage Mr. Slavin to stay?

A. No, we tried to discourage him.

Q. In what way.

A. Ask him when he was going out, and one time I suggested to him why not go outside and get a job where he could get in his time.

Q. Why did you say that?

A. We didn't need him at the hotel and we were very pressed for money and to board another person was quite an expense.

(Testimony of Esther Heady.)

Q. Did you think that at some time you would have to pay him? A. No.

Mr. Nesbett: That is all.

The Court: Has the jury any questions?

(No response.)

Mr. McCarrey: The defendants rest.

The Court: Any rebuttal testimony?

Mr. Nesbett: Call Mr. Slavin.

LAWRENCE E. SLAVIN

previously called as a witness on behalf of the plaintiff resumed the stand and testified as follows on rebuttal:

Direct Examination

By Mr. Nesbett: [105]

Q. Mr. Slavin, you heard Mrs. Heady testify that—— A. I did.

Q. Wait until I ask the question. You heard her testify that on October 2nd a conversation took place wherein you said you would like to stay around a couple of weeks and work for your room and board. A. Yes, I heard it.

Q. Did you have any money of your own?

A. Yes, I did.

Mr. Bell: Object as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Well, I had somewhat over a thousand dollars in the bank and quite a bit of change in my pocket.

(Testimony of Lawrence E. Slavin.)

Q. Do you know how much you had in your pocket? A. I couldn't say now.

Q. Was that from your work at the cannery?

A. Yes.

Q. Can you look at the bank statement and see exactly how much you had in the bank?

Mr. Bell: Object. No evidence that he didn't have plenty of money.

The Court: Overruled. That is for the jury to decide.

Q. (By Mr. Nesbett). Find October of forty-seven? [106]

A. Yes, I find it here. It varies there at that time. There were deposits made up until October 1st was fourteen hundred dollars, and the 25th it was over three thousand dollars.

Q. How much did you have at the end of January of 1948, on January 23rd?

The Court: I don't think that has any bearing on that. What he had at the time he went to work might have some bearing, but not what he had in January. If there was any contract it was made in October, and not in January.

Mr. Nesbett: That is all.

The Court: Counsel for defendant may examine.

Mr. Bell: That is all.

The Court: Any sur-rebuttal testimony?

Mr. Bell: No, your Honor.

The Court: Counsel for plaintiff may make opening argument to the jury.

Mr. Bell: Would counsel for plaintiff like to agree to a short time, so we can get out of here. Could we agree on fifteen minutes on a side?

Mr. Nesbett: We have already made an agreement, your Honor.

Mr. McCarrey: I have talked to Mr. Nesbett, but Mr. Bell thinks it should be even Stephen.

Mr. Nesbett: We made an agreement outside the hearing of this jury. [107]

The Court: If the agreement was made, however I——

Mr. Bell: I didn't agree to it.

Mr. McCarrey: I did agree, but I told him I would have to see Mr. Bell first to see that it was all right, you know that.

Mr. Nesbett: Oh, yes.

Mr. Bell: We will be perfectly willing to divide the time with him, and make it short.

Mr. Nesbett: Then I suggest that we adjourn and argue the case tomorrow morning. The jury can have the day then to make the decision.

The Court: Ladies and gentlemen, is there any reason why you can't appear at 9:30 in the morning? Is there any objection?

(No response.)

The Court: Perhaps that is the better plan, and then the jury will have daylight hours to deliberate the case. We will be deprived of the services of the jury on another case, but I guess that will be all right. I suppose counsel wouldn't care to go as far as he can with the argument tonight?

Mr. Nesbett: The time we agreed on would take us past the deadline.

The Court: Just the opening, otherwise we will continue it.

Mr. Nesbett: That is all right.

Mr. McCarrey: I wouldn't like to keep the jury out, but I [108] would like to wind the case up.

The Court: In view of the circumstances then, and the requirement that we be out of this room before five, the case will be continued until tomorrow morning at 9:30, and please remember the hour, ladies and gentlemen. If one of you is late we can't go ahead.

You will also remember your duty not to discuss the case among yourselves or with others, or to form or express an opinion until it is finally submitted to you, and if any person should attempt to talk to you about the case please stop him or her right there, because nobody has the right to discuss it with you outside the Court room. It is not good business and it may lead to difficulty.

(Whereupon, at 4:25 o'clock p.m., the court recessed until 9:30 o'clock a.m. of the following day.) [109]

February 9, 1950

The Court: The Clerk will call the roll of the jury.

(The names of the members of the jury were called by the Clerk.)

The Clerk: Jury in the box all present, your Honor.

The Court: Counsel for the plaintiff may make opening argument.

Mr. Nesbett: First, Mr. McNealy asked me to express his appreciation for being excused. If your Honor please, I am going to confine myself to ten minutes, because the issues are relatively simple in the case, and fifteen minutes to reply to Mr. McCarrey and Mr. Bell, assuming they will use only that much time also. Being a civil case, you all know that Mr. Slavin is required to prove his case only——

Mr. McCarrey: Your Honor, we will waive reporting the arguments.

Mr. Nesbett: We will also waive reporting the arguments.

(Whereupon the reporter was excused.)

The Court: Next thing in order is instructions to the jury.

Mr. Bell: Don't you think you could give instruction on that and on the idea that he did say you owe me nothing?

The Court: All the evidence is to be considered, but the [111] defendants himself says——

Mr. Bell: But the statement that you owe me nothing and it is just a gift from heaven.

The Court: It is all before the jury.

Mr. Bell: Mr. Nesbett has drawn it out in his argument.

The Court: I couldn't do that.

Mr. Bell: Let me see it before——

The Court: Oh, yes. Let me read this. I don't

believe I could, but have you a copy of the proposed instruction?

Mr. Nesbett: Not of this one.

The Court: Copy can be given later. I don't intend to give it.

Mr. McCarrey: Exception.

The Court: Ladies and gentlemen, I will now read the instructions.

(Instructions to the Jury are read by the Court.)

The Court: And I have signed the instructions as District Judge. Counsel may come to the bench with the Reporter.

Mr. Nesbett: I want an objection, or rather an exception, to the first Paragraph of No. 3, the second line, that it should be "defendants, or either of them," that particular wording. [112]

The Court: All right, I shall insert that "defendants, or either of them."

Mr. Bell: I object to adding that, because there is no evidence of an agreement referred to only in the presence of both of them.

The Court: Exception is noted.

Mr. Nesbett: I thought the words "going carpenters' wages" should be inserted somewhere in line 7, 8 or 9.

The Court: I will put that between 6 and 7 "at going carpenters' wages."

Mr. Bell: Now, that would be in Homer, Alaska. It wouldn't certainly be here.

The Court: I will put a comma after wages. It

would read, "would be compensated by defendants therefor, at going carpenters' wages,".

Mr. Bell: I want to specifically except to that on the issue as it now stands complete, it infers going capenters wages at Anchorage, and does not infer going carpenters' wages at Homer, where it was performed.

The Court: All right.

Mr. Nesbett: In another part of the instruction you say this constitutes all the testimony?

Mr. Bell: At Homer, not at Anchorage.

The Court: Suppose I insert "at Homer, Alaska," at that point? [113]

Mr. Nesbett: I don't see that it should be limited to Homer.

Mr. McCarrey: I would like to point out the fact that there is quite a little evidence even by the plaintiff that economic conditions at Homer are not so good as elsewhere, so I take exception to that being other than Homer, Alaska.

The Court: The testimony was just going carpenters' wages not particularly at Homer, Alaska.

Mr. McCarrey: Exception.

The Court: All right, Mr. Bell.

Mr. Bell: I want an exception to the first paragraph of Instruction 3, for the reason that it does not state the law carefully, and places too great a burden on the defendants, and is misleading to the jury.

I want the same exception to Paragraph 2 of Instruction 3, commencing on line ten of Instruction 3, for the same reason.

I would like an exception to the third paragraph of Instruction 3, which commences on line fifteen, and extends down to and including line twenty-two; and

An exception to the fourth paragraph of Instruction 3, commencing on line twenty-three, and ending on line thirty-two, for the reason that all of these instructions misstate the law probably applicable to this case, and places too great a burden on the defendants, and is based only upon [114] the plaintiff's contention in the case, and the defendants' contentions having been completely ignored.

Mr. McCarrey: It has been ignored—that is defendants' theory of the case has been ignored, in that defendants' theory has been that it was an agreement entered into at the time that the work began, that is the determining factor and not the reasonable value of services, or the going wages.

The Court: I think that may be the last part of the last paragraph should be amended, “* * * for if you find that the agreement between the parties was to the effect,” after the word “compensation.”

Mr. Bell: On line twenty-nine?

The Court: Yes, after the word “compensation,” I think probably this language ought to be inserted, “or if in your minds the evidence is equally balanced between the plaintiff and the defendants on this question.”

Mr. Bell: Now, your Honor, I want to keep this one. There is one other here that I want to take. I take exception to Instruction No. 7 in its entirety, for the reason that it deprives the jury of a method

of reasoning the amount due, and if they do arrive at an amount by striking lots it would still have to be concurred in by all of the parties before it would be their verdict, and therefore it places too great a burden on the defendants in this case.

The Court: I don't know whether that word should be—I [115] will strike out "the compensation agreed upon," that is before the words "for his service."

Mr. Nesbett: Strike out the word "reasonable."

The Court: Yes. Do you want to take any further exceptions.

Mr. Bell: None whatever, but I do want to offer that.

The Court: The Court refuses to give the Instruction No. 1 submitted by the defendants except as some parts of it may conceivably be included in the instructions. It is denied as submitted.

The Court: Ladies and gentlemen, since reading the instructions there have been changes, and I will now read it:

The issue in this case is a relatively simple one, and that is whether or not the plaintiff and defendants or either of them agreed that plaintiff should work for the defendant in the construction work described in the pleadings and in the testimony and would be compensated by defendants therefor, at going carpenters' wages, no exact amount of compensation having been agreed upon, or whether plaintiff agreed to work for his board and lodging only.

If such agreement was made as claimed by plain-

tiff, then the plaintiff is entitled to the compensation agreed upon for his services and as bearing upon that issue, you may take into consideration all testimony relating to compensation [116] paid for similar work under similar conditions.

If you find that the agreement was entered into as claimed by the plaintiff in his complaint, as modified by his reply, and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered.

But unless the plaintiff has proved the averments of his complaint, as modified by his reply, by a preponderance of the evidence, your verdict should be for the defendants and against the plaintiff, for if you find that the agreement between the parties was to the effect that the plaintiff would work for his board and room only, and that there was no agreement to give him any other compensation, or if in your minds the evidence is equally balanced between plaintiff and defendants on this question, then the plaintiff is not entitled to recover from the defendants in this action and your verdict should be for the defendants and against the plaintiff.

The Court: Now, these are no more important than the rest of the instructions, and are a part of the instructions. They are entitled to just as much consideration as the other instructions.

The two alternate jurors, Mr. Longmire [117] and

Mr. Nielsen, are now excused with the thanks of the Court. Please report back here at two o'clock this afternoon for service in another case.

Here are two forms of verdicts for you. Have you the pleadings?

The Clerk: No, I haven't, your Honor.

The Court: There is only one exhibit, I believe.

The Clerk: Yes.

The Court: I hand you all the pleadings, consisting of the complaint, answer and reply.

The Clerk: Will the bailiff step forward, please.

(Clerk swears the bailiff, John H. Mack.)

The Court: Does counsel wish to stipulate that the jury may return a sealed verdict, if no verdict has been reached by 5 o'clock this afternoon?

Mr. McCarrey: It is all right with us.

Mr. Nesbett: We will so stipulate.

The Court: Ladies and Gentlemen, while we hope that you will be able to reach a verdict before five o'clock, if you have not reached a verdict by five o'clock this afternoon, then you may return a sealed verdict. I will presently read to you the endorsement on the envelope.

You will provide the jurors with food and liquids, except alcohols, of course. I don't know whether you can use the jury room. [118]

The Court: The endorsement on the sealed verdict is as follows:

Ladies and Gentlemen of the Jury:

If you have not reached a verdict by 5:00 o'clock p.m., today, then when you have agreed upon a verdict, have the foreman sign the same, seal it up

in this envelope, and keep it in his possession, unopened.

You may then separate and go to your homes.

No juror must say anything about the verdict agreed upon.

All jurors must be in the jury box in court at 10 o'clock a.m., of Friday, Feb. 10, 1950, at which time the verdict will be handed to the Court and opened in the presence of the jury.

Dated at Anchorage, Alaska, this 9th day of Feb. 1950.

I signed it as District Judge, and it has been signed by counsel for plaintiff and for defendants.

Ladies and gentlemen, you may now retire to consider of your verdict.

(Whereupon at 11:25 a.m., February 9, 1950, the jury retired in charge of their sworn bailiff, John H. Mack.) [119]

Thereafter, at 3:25 o'clock p.m., of the same day, February 9, 1950, Court is reconvened, and the trial jury in the above entitled cause reports back.

The Court: Mr. Bell, is it necessary to have Mr. McCarrey here for this verdict?

Mr. Bell: I think not, your Honor. I will take the responsibility of watching things.

The Court: The roll of the jury may be called in the case of Lawrence E. Slavin against Alfred E. Heady and Esther Heady.

(Whereupon the Clerk calls the roll.)

The Clerk: All present, your Honor.

The Court: Ladies and gentlemen, have you arrived at a verdict in this case?

Mr. H. L. Bliss, Foreman: We have, your Honor.

The Court: Will you hand the verdict to the Clerk. The Clerk will read the verdict signed by the Foreman.

The Clerk:

“In the District Court for the Territory of Alaska
Third Division

LAWRENCE E. SLAVIN,

Plaintiff,

vs.

ALFRED HEADY and ESTHER HEADY d/b/a
HEADY HOTEL,

Defendants.

“No. Sel—5707

Verdict No. I.

We, the jury, duly selected, impaneled and sworn to try the above entitled cause, do find for the plaintiff and against the defendants, and find that the plaintiff is entitled to recover of and from the defendants the sum of Twelve Hundred Eighty 00/100 Dollars (\$1280.00), together with interest thereon at the rate of 6 per cent per annum from January 23, 1948.

Dated at Anchorage, Alaska, this 9th day of February, 1950.

H. L. BLISS,
Foreman.”

The Court: Ladies and gentlemen, you have heard the verdict just read. Is that your verdict, so say you all.

Jury: Yes.

The Court: Do you care to have the jury polled.

Mr. Bell: I would.

The Clerk: Bertha Miers, is that your verdict?

Bertha Miers: It is.

The Clerk: Mrs. Lorene Gray, is that your verdict?

Mrs. Lorene Gray: Yes.

The Clerk: Jean Wright, is that your verdict?

Jean Wright: It is.

The Clerk: Richard D. Huff, is that your verdict? [121]

Richard D. Huff: It is.

The Clerk: Wardie W. King, is that your verdict?

Wardie W. King: It is.

The Clerk: Robert Claypool, is that your verdict?

Robert Claypool: Yes.

The Clerk: Orie P. Ivie, is that your verdict?

Orie P. Ivie: It is.

The Clerk: Tom Kovak, is that your verdict?

Tom Kovak: It is.

The Clerk: Mary Bolan, is that your verdict?

Mary Bolan: Yes.

The Clerk: Edward Nightingale, is the verdict your verdict?

Edward Nightingale: It is.

The Clerk: Alfred M. Lee?

Alfred M. Lee: It is.

The Clerk: H. L. Bliss?

H. L. Bliss: It is.

The Clerk: The jury has been polled, your Honor.

The Court: The verdict may be received, filed and entered. Thank you for your service, Ladies and Gentlemen, you are now excused until 10 o'clock tomorrow morning, when you will report to the Court Room in the Federal Building. [122]

United States of America,
Territory of Alaska—ss.

I, Lorraine Clarke, the Official Special Court Reporter for the District Court of the United States, Third Division, Territory of Alaska, hereby certify the above and foregoing 123 pages to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

/s/ LORRAINE CLARKE.

[Endorsed]: Filed June 2, 1950. [123]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of Counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, and including specifically the complete record and file of such action as set forth in the amended Designation of Record.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on February 24, 1950, to the United States Court of Appeals at San Francisco, California.

M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Seal] By /s/ IOLA FOWLER,

Chief Deputy Clerk. [124]

[Endorsed]: No. 12569. United States Court of Appeals for the Ninth Circuit. Alfred Heady and Esther Heady, doing business as Heady Hotel, Appellants vs. Lawrence E. Slavin, Appellee. Transcript of Record. Appeal from District Court for the Territory of Alaska, Third Division.

Filed June 6, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12,569

IN THE

United States Court of Appeals
For the Ninth Circuit

ALFRED HEADY and ESTHER HEADY,
doing business as Heady Hotel,

Appellants,

VS.

LAWRENCE E. SLAVIN,

Appellee.

Appeal from the District Court of the Territory
of Alaska, Third Division.

BRIEF FOR APPELLANTS.

BAILEY E. BELL,

J. L. MCCARREY, JR.,

Anchorage, Alaska,

Attorneys for Appellants.

FILED

OCT 19 1950

PAUL P. O'BRIEN,
CLERK

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No. 12,569

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALFRED HEADY and ESTHER HEADY,
doing business as Heady Hotel,
Appellants,

VS.

LAWRENCE E. SLAVIN,

Appellee.

**Appeal from the District Court of the Territory
of Alaska, Third Division.**

BRIEF FOR APPELLANTS.

JURISDICTION.

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Section 101. The jurisdiction of the Court of Appeals rests on Section 1291, of the New Federal Judicial Code, and Federal Rules of Civil Procedure.

JUDGMENT BELOW.

A judgment was entered in the District Court at Anchorage, Alaska, on the 24th day of February, 1950 (TR. 20), based upon a verdict rendered by the jury on February 9, 1950 (TR. 8), from which this appeal is taken.

STATEMENT OF FACT.

The plaintiff in the Court below, Lawrence E. Slavin, filed his complaint in the District Court, Third Judicial Division, on September 7, 1949, wherein he prayed to recover judgment against the defendants, Alfred Heady and Esther Heady, doing business as Heady Hotel, at Homer, Alaska, in the sum of one thousand two hundred eighty dollars (\$1,280.00), with interest and five hundred dollars (\$500.00) attorney's fees. The charging part of the complaint is: "The plaintiff worked as a carpenter for the defendants in the construction of defendants' hotel, over a period of sixteen forty hour weeks, from the 2nd day of October, 1947, to the 23rd day of January, 1948, inclusive, at the special instance and request of the defendants, and *for the stipulated wages of \$2.00 per hour, for each and every hour so worked by the plaintiff, and in addition to the said \$2.00 per hour, plaintiff was to receive board and lodging from defendants,* which board was provided by the said defendants. (See paragraph I, of the complaint; TR. 2.) (Emphasis ours.)

To this complaint, the defendants answered, denying that they agreed to pay the plaintiff anything for said work, and alleged that the plaintiff offered to work and stated that he would board and room with the defendants, that he needed something to do, and that no price for work was ever agreed upon, except that the defendants acting by and through Alfred Heady, told the plaintiff that they had no money to pay him for labor; that he (Alfred Heady), and Tommy were going ahead and build it and the plaintiff insisted on helping and stated that he needed a place to live and without any agreement for the payment of any money whatsoever, he did commence working and did work at intervals, never a full week, never a full day, only worked as he saw fit and was never called to do any particular thing. When this answer was filed, which was on October 4, 1949, it was served on opposing counsel and on October 19, 1950, a reply was filed that was signed by one of the attorneys, for plaintiff, R. J. McNealy, and was verified by the said R. J. McNealy, and this reply denied each and every material allegation made by the defendants in their answer, which is not in full accord and agreement with plaintiff's complaint, except defendants' statement: "No price for work was agreed upon", and in that plaintiff understood he was to have going carpenter wages, and in this reply prayed to recover as in the complaint filed. This reply was filed without permission of the Court having been obtained, and without any order directing its filing and was surplusage, and no part of the pleadings in the case.

EVIDENCE.

Lawrence E. Slavin was called as a witness and testified that he had lived in Homer, Alaska, since 1920; that he was a carpenter and fisherman; had been a carpenter for 20 years; had occasion to work for the defendants, Mr. and Mrs. Heady. (TR. 37.) He began work October 2, 1947, and worked until January 22 or 23, 1948; he worked *six weeks*. Then you find the following questions and answers on page 37 TR.:

“Q. Do you know how many weeks that was?

A. Six weeks. (4)

The Court. I missed part of the answer. You said you began work——

A. October 2nd.

The Court. Until when?

A. January 23.

Q. (by Mr. McNealy). Did I understand you correctly that you worked from the 2nd of October until the 23rd of January?

A. Yes.

Q. That is more than six weeks?

A. It may be more than six weeks.

Q. Did you, or did you not allege in your complaint that you worked sixteen weeks?

A. Well, yes, it is sixteen weeks.

Q. How many hours a week did you work?

A. Forty hours.”

That he put in doors and windows, worked on the sub-floor and stairways; that he was asked this question (TR. 38): “What did they pay you for the sixteen weeks’ work at forty hours per week?”

To this an objection was stated as follows:

“Mr. Bell. I object to the question. It is not based upon the prior evidence and assuming something not in evidence.

The Court. Overruled.

Mr. Bell. Exception.”

“Q. What did they pay for the 16 weeks work of forty hours per week?

A. All I received at the time was my board.”

He roomed with the other fellow in the cabin. Headys furnished the board. Then these proceedings took place (TR. 39):

“Q. Prior to the time you went to work for the Headys, for whom did you work?

A. Squeaky Anderson of the Seldovia Alaska Packers.

Q. Is that a cannery?

A. Yes.

Q. In what capacity did you work for Squeaky?

A. As a carpenter.

Q. You have stated, I believe, that you have twenty years experience as a carpenter?

A. Yes, sir.

Q. How much per hour, if you remember, did Squeaky Anderson pay you?

Mr. Bell. Object as incompetent, irrevelant, and immaterial. This is not a suit on *quantum meruit*, but on direct contract so pleaded.

The Court. That is the way it was pleaded in the complaint. The reply may——

Mr. McNealy. Your Honor, in the reply we did state that there was no actual price agreed

upon. It was an error on my part in drawing the complaint in stating that there was a stipulated amount.

The Court. What is the purpose of this question, to prove the going carpenter wages?

Mr. McNealy. Yes.

Mr. Bell. That wasn't the question.

The Court. The objection is overruled.

Q. (by Mr. McNealy). Go ahead and answer the question.

A. Squeaky paid me two dollars an hour and board and room.

Q. Was that the going carpenters wage at that time?

A. I believe that was the cannery wage at that time.

Mr. Bell. Your Honor, I move to strike the answer as not responsive to the question, and further that it is outside the pleadings and not within the issue.

The Court. Motion is denied."

Then further down on page 40 TR., and continuing on page 41, you find the following record:

"Q. Now, Mr. Slavin, you have stated that you worked for the Headys on the hotel. Will you explain to the Court and to the Jury all the circumstances surrounding your employment with the Headys between the dates of October 2nd and January 23rd?

A. Well, I came to Homer the 2nd of October. Tommy was working in the hotel, and I said to Tommy, 'Give me a hammer and I will help you.'

The Court. Who was that?

A. Tommy Wickland. He was working with Al at that time, so I proceeded to help him that afternoon and evening. I told them that evening at supper I could help them for a few days. The next day they gave me the windows and doors to hang. I proceeded with that. At the time they were working on a water system and hauling coal. The second day I was there Al told me at that time he couldn't see his way clear then to pay me wages, but he was keeping track of the time and he would pay me at some later date. So on the strength of that I sent and got my tools. From then on I was just working at the windows and doors the sub-flooring and one thing or other for a period of about six weeks, and I worked along in the building, got it enclosed for cold weather. That is the way it carried on until the latter part of January."

Then on page 42 TR., you find the following questions and answers:

"Q. Explain, if you can, why you had your tools shipped from Seldovia over to Homer?

A. As I stated, on the strength of Al's statement that he needed someone and said he couldn't pay me then, but he was keeping track of the time and at a later date he would reimburse me, so that is the reason I sent for the tools."

Then again on page 43 TR., you find these questions and answers:

"Q. By your work for the defendants, Mr. and Mrs. Heady, did they get into the hotel any sooner than they would otherwise?

Mr. Bell. Objection, calling for a conclusion of the witness.

The Court. Overruled.

Q. Did they, by reason of your work, get into the hotel sooner than they would otherwise?

A. Yes (11)."

He then testified that he put in some windows and doors and did the biggest part of the sub-floors and finished up some stairways and living quarters. On cross-examination, he testified that he worked for Squeaky Anderson in the fall of the year, constructed some buildings, did some fishing, had worked for Squeaky that Spring; worked at the Post as a carpenter in 1943; came to Homer October 2; was planning on being around Homer to get some surveying done, surveying of a homestead, his Father's homestead, intended to stay around Homer while the surveying was being done; there was a house on the homestead but there was a family living in it. He knew that Al (Heady) was trying to build a log building for a hotel. He knew Tommy Wickland, Tommy was a carpenter. When he first went there Mr. Heady was not present. He said to Tommy, "Give me a hammer, and I will help you out"; that Tommy got him a hammer and he did help him. That was about two o'clock. He had come from Seldovia that day; intended to stay in Homer for a while. Worked until about five o'clock that evening. It was pretty cold. It was beginning to get cold. Had his evening meal at the Heady's; had a talk with

them that evening. He was a friend of the Headys. Told Mr. and Mrs. Heady he was going outside, and had to hang around until he could get some surveying done. Mr. Heady told him he had no money to pay him with. That he and Tommy were just building it themselves. He didn't say anything about price. He told them, "I told him, I would be glad to give him a few days work". (TR. 48.) Then he was asked this question and gave this answer:

"Those first few weeks you didn't intend to charge him?"

"I didn't think there was any charge." (TR. 48.)

Then on page 49 TR., you find the following questions and answers:

"Q. Where were you going outside?

A. Well, I don't know as—I generally visit around Seattle and then go over in the country where I was born and raised and Lord knows where I would have gone to.

Q. You are a single man?

Q. Never been married?

A. No.

Q. Did you live on your father's homestead a good long time?

A. Yes.

Q. How long?

A. Ten years.

Q. How far is that from Homer?

A. About two and a half miles east of the Heady Hotel.

Q. Did you finally go outside?

A. Yes.

Q. When did you go?

A. I believe it was the 5th of February.

Q. How did you go?

A. I flew out.

Q. Did you stay with the Headys until you went outside?

A. I boarded there. I was staying with Tommy Wickland.

Q. Who furnished the beds?

A. I furnished my own bedding.

Q. You had sheets?

A. My own bedding—my own sheet blankets.

Q. Who furnished the bed?

A. I believe the Headys. That was at Tommy Wickland's.

Q. How far was Tommy's place from where the Headys lived?

A. Oh, probably 300 yards.

Q. And you stayed over at Tommy Wickland's and you had your meals at the Heady's place?

A. Yes.

Q. Who did your laundry?

A. Every bit of laundry I had I did it myself.

Q. You are sure Mrs. Heady didn't do it?

A. I believe it was just before Christmas she said she would be glad to do my laundry. It was a kind of shack and drying conditions weren't good.

Q. After you got to the hotel she did do it for you?

A. We did it together.

Q. Sometimes you would help her with the laundry?

A. Yes.

* * * * *

Q. You did help them with the car—the truck?

A. Yes.

Q. Some days it was too bad to work?

A. No, I was inside working and enclosing the building.

Q. Did you ever use the truck for your own uses?

A. Yes, maybe half a dozen times.

Q. You did have the engineer survey your place?

A. Yes, I think we was out there a day or day and a half.

Q. Did you stay at the home property at that time?

A. No.

Q. You drove back and forth?

A. Yes.

Q. You drove Mr. Heady's truck for that?

A. I believe I used it.

Q. Did you do any hauling otherwise with his truck?

A. I don't recall doing any hauling only there was one time I went to the dock to pick up some oil. At that time Heady had about four drums of oil himself, oil I had bought in Seldovia at one time and brought back.

Q. For whom?

A. For Heady and for myself.

Q. What did you do with that oil?

A. It set there by the hotel until last fall and I went and got it.

Q. That was outside by the hotel?

A. Yes.

Q. The Heady Hotel?

A. Yes."

Then on page 52 TR., you find these questions and answers:

"Q. Did you work during Christmas week?

A. Yes, I believe we did.

Q. Stop just a minute?

A. I would say yes.

Q. Did you work on Christmas day?

A. No.

Q. Did you work New Years day?

A. No.

Q. Did you work the second week in January?

A. I suppose I did.

Q. You just don't remember?

A. I was working practically all the time I was there.

Q. Were you there at Thanksgiving?

A. Yes.

Q. Did you work Thanksgiving day?

A. No.

Q. You had Thanksgiving dinner at the Heady place, didn't you?

A. I tell you I don't recall that. There was one holiday we went over to Carl Byers and I forget, but I think that was Christmas.

Q. You and the Headys were very close friends, weren't you?

A. Yes, we were."

Then on page 53 TR.:

“Q. Did you tell Mrs. Heady this, or this in substance, that you would like to build that stairway that you had always wanted to?

A. Yes.

Q. You wanted to build it a certain way that you had in mind?

A. Yes.

Q. And she said all right?

A. I don't believe it was Mrs. Heady. I believe it was Al, we always talked things over with.

Q. He said go ahead?

A. Yes. He turned it over to me. He always seemed satisfied to.

Q. He always let you do it just as you wanted to?

A. Yes.”

Then on page 56 TR., you find these questions and answers:

“Q. You had your ground surveyed out in the country during that time?

A. Yes.

Q. Were you out there some time when you were having that survey?

A. About a day and a half.”

Then on page 59 TR. we find these questions and answers:

“Q. You stayed with the Headys until you went outside, didn't you?

A. Yes.

Q. And you stayed at the same place and had the same bed that you had?

A. Yes.

Q. They furnished your board?

A. Yes.

Q. Did you ever move in the hotel with them?

A. In the spring after I came back from the outside.

Q. Did you pay them for your accommodations then?

A. I don't believe there was anything asked for that. They put up a couple of cots and we furnished our own mattresses.

Q. Who stayed there besides you?

A. My nephew.

Q. How long did you stay?

A. The first night I arrived I stayed with Tommy Wickland and would have continued staying with Tommy only Al told me a story about Tommy and invited me over there.

Q. He invited you?

A. Yes.

Q. And your nephew came over with you?

A. Yes.

Q. How long did you stay?

A. I couldn't say exactly. I don't know just when we left to go fishing, sometime in May, I believe.

Q. And he never charged you anything for board?"

Then on page 62 TR.:

"Q. (by Mr. Bell). You told Mr. McNealy that there was a stipulated amount of two dollars per hour to be paid you?

A. That is what I asked.

Q. You told him that?

A. Yes."

Then on page 78 TR.:

"Q. As I understood you awhile ago when Al told you he was going to give you his half interest in the sawmill you were very much pleased?

A. At that time.

Q. You did make some statement to him that you were very well pleased?

A. Yes, at that time.

Mr. Bell. That is all.

The Court. Any re-direct?"

Then on page 80 TR.:

"Q. Was it, or was it not your understanding at one time that you were to have this sawmill for your wages?

A. Yes."

And then on pages 71 and 72 TR., you find these proceedings:

"Q. Did Mr. Heady tell you that the mill had served its purpose so far as he was concerned, that he just wanted it to saw logs and lumber to build the hotel?

A. I couldn't say.

Q. Was there something like this?

A. I couldn't say definitely.

Q. I will ask you if he didn't say to you, 'I will give you my half interest in that sawmill. It can serve no purpose to me, and it will be a benefit to you,' and if you didn't say, 'Well, it's

just like a gift from God, you don't owe me anything, and I sure appreciate it'?

A. No, sir. Mrs. Heady wasn't there.

Q. I asked you if you didn't say that to Al?

A. I don't recall the words.

Q. Did you say it was a gift from God?

A. No, I knew it wasn't.

Q. Or a gift from heaven?

A. No.

Q. What were the words you said that it was just a gift?

A. I didn't say it was a gift.

Q. What words did you use to Mr. Heady?

A. I said I would be satisfied with that arrangement.

Q. Didn't you add to that these words, 'Al, you don't owe me anything, and I sure appreciate it'?

A. Maybe I said that after he gave me the sawmill, they wouldn't owe me."

ARGUMENT.

For the purpose of this brief, appellants will consolidate for argument, statement of points 8, 9, and 10, relied upon for reversal, which are as follows:

No. 8. The Court erred in not sustaining the defendant's motion to dismiss the case at the close of plaintiff's evidence.

No. 9. The Court erred in overruling the defendants' motion to dismiss at the close of all of the evidence.

No. 10. The Court erred in submitting on a *quantum meruit* instruction when the action was based upon an exact, explicit contract which was not proven.

As all of the cases cited under this heading apply to some, or all of these three points of error.

It will be remembered that the plaintiff filed a complaint for the recovery of money based upon a *specific contract for the stipulated wage of \$2.00 per hour, for each and every hour so worked by the plaintiff*, and in addition to the said \$2.00 per hour, plaintiff was to receive board and lodging, from the defendant, which board was provided by the defendants. See complaint. (TR. 2.) Now this part of the complaint was specifically denied in the answer. (TR. 4, 5 and 6.) Then without any authorization, nor order to the Court, and with no permission having been granted by the Court, the plaintiff's attorney, R. J. McNealy, filed in the District Court, what purports to be a reply, which is more or less unintelligible, but it does say in the second paragraph (Emphasis ours):

“No price for work was agreed upon, and the plaintiff understood he was to have going carpenter wages”,

which is in direct contradiction and is a variance from plaintiff's complaint.

Assuming that the Federal Rules of Civil Procedure control, then we call your attention to Rule 7 (a), Title 28 U.S.C.A., at page 245, which reads as follows, to-wit:

“Rule 7. Pleadings Allowed: Form of Motions. (a) There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. *No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer. As amended Dec. 27, 1946, effective March 19, 1948.*” (Emphasis ours.)

The Second Circuit Court of Appeals has construed this rule in the case of *Zydney v. New York Credit Men's Ass'n.*, 113 Fed. (2d) 986. The third syllabus reads:

“Bankruptcy, key 212. Where petitioner filed a petition in reclamation against a trustee in bankruptcy, and trustee filed a so-called ‘answering affidavit’, *and referee had ordered no reply, none was permissible*, and a reply which consisted in part of argument and in part of new facts was not a proper reply, even if a reply had been ordered. Bankr. Act. pp. 1 (9), 21, sub. a., 11 U.S.C.A. pp. 1 (9), 44, sub. a.; General Order in Bankruptcy No. 37, 11 U.S.C.A. following section 53; Rules of Civil Procedure for District Courts, rules 7 (a), 8 (b), 28 U.S.C.A. following section 723c.” (Emphasis ours.)

And in *Carpenter v. Rohm & Hass Co., Inc.*, 75 Fed. Supp. 732, the first syllabus reads:

“1. Federal civil procedure, key 803, 870. Where reply and supplementary reply had not been ordered by the court, and where largely irrelevant and objectionable, they would not be allowed or considered. Federal Rules of Civil Procedure, rule 7 (a), 28 U.S.C.A. following section 723c.”

and from the body of the opinion on page 733, we quote:

“(1) The plaintiff then filed a ‘reply to the answer’, consisting of 31 paragraphs and a supplementary reply of 12 paragraphs. No reply to the answer or supplementary reply having been ordered by the court, and the reply and supplementary reply being largely irrelevant and objectionable so pursuant to Rule 7 (a), they are not allowed or considered.”

This action being based upon specific contract, the law in the case of *Brightson v. H. B. Claflin Co.*, 72 N.E. 920, is very persuasive of appellant’s position; quoted from the body of the opinion on page 921:

“The objection was to the effect that the proof was a departure from the cause of action stated in the complaint. No amendment of the complaint was asked or allowed, and the question is not in respect to the power of the court to grant an amendment in such case, but as to the right of the plaintiff to recover for the breach of a contract for one year, based entirely upon an inference or implication of law.”

* * * * *

“If a party can allege one cause of action, and then recover upon another, his complaint will

serve no useful purpose, but rather to ensnare and mislead his adversary. The defendant by its answer made a distinct issue with respect to the contract stated in the complaint. It denied the making of any such contract, and, among other defenses, interposed the statute of frauds; expressly alleging that there was no note or memorandum in writing of the five-year contract. Under the authorities cited above, the defendant's objection to the proof at the trial should have been sustained, and the exceptions were well taken." (Emphasis ours.)

This is identical to the case at bar. Wherein the complaint alleged a cause of action upon specific and direct contract and then failed to prove it, never asked to amend, and no amendment was made and at the close of the evidence, defendants moved to dismiss, which motion should have been sustained.

Among the various authors discussing similar cases, there is a very definite statement in Bancroft's Code Pleadings with Forms, I, at page 984, paragraph 700, a part of which reads:

"Par. 700: Allegations and Proof must Correspond: It is elementary law that the proof must correspond to the allegations. The plaintiff must recover, if at all, upon the case made by the pleadings, and not upon a case which may be developed by the proofs. *A judgment cannot be sustained unless the proof establishes the cause of action alleged in the complaint*, even though a different cause of action be fully proved." (Emphasis ours.)

The Supreme Court of Washington in the case of *Clark v. Sherman*, 32 Pac. 771, settled the rule in that state, which seems to be almost, if not the universal rule throughout the United States. The first two, and only, syllabus read, as follows:

“Pleading and Proof-Variance-Reply. 1. An action for money had and received is not supported by proof that defendant is liable on a contract by which he agreed to pay plaintiff the amount of money sued for. *Distler v. Dabney*, 28 Pac. Rep. 335, 3 Wash. St. 200, followed.

2. Plaintiff cannot recover, though her real cause of action is set out in her reply, since a plaintiff cannot allege one cause of action in his complaint, and then, by means of a reply, recover on an entirely different cause of action.”

And from the body of the opinion on page 771, you find the following statement:

“Plaintiff seeks to avoid the effect of that decision, by showing that her real cause of action is disclosed by the answer and reply, and that she ought to be allowed to recover on that account. We cannot sustain this contention. A plaintiff cannot allege one cause of action in his complaint, and then, by means of a reply, recover upon an entirely different cause of action. The judgment must be reversed, and the cause remanded, with instructions to sustain the motion of the defendant for a nonsuit.”

Another case directly in point is found in 110 N.E. Rep. 426, *Walrath v. Hanover Fire Ins. Co.*, the third syllabus reads:

“Judgment, key 249—Conformity to Complaint. Plaintiff must recover on the facts stated in his complaint; and it proceeding on a definite and certain theory, will not support a judgment on another theory, though containing isolated or subsidiary statements consistent therewith.”

Then over in the body of the opinion on page 427, you find this statement:

“(3) It is fundamental that in civil actions the plaintiff must recover upon the facts stated in his complaint, or not at all. In case a complaint proceeds on a definite, clear, and certain theory, it will not support or permit of another theory because it contains isolated or subsidiary statements consistent therewith. A party must recover not only according to his proofs, but according to his pleadings. *Northam v. Dutchess Co. Mut. Ins. Co.*, 177 N.Y. 73, 69 N.E. 222; *Canton Brick Co. v. Howlett*, 169 N.Y. 293, 62 N.E. 347; *Brightson v. Claflin Co.*, 180 N.Y. 76, 72 N.E. 920; *Southwick v. First Nat. Bank of Memphis*, 84 N.Y. 420.”

The Eighth Circuit Court of Appeals in the case of *Union Pacific R. Co. v. Garner*, 24 Fed. (2d) 53, had the same question before it and there upheld our contention here, and on page 54 from the body of the opinion, we quote:

“It will be observed from the foregoing that the plaintiff predicated her right to recovery upon a theory which was entirely disproved by her evidence. The court, however, submitted the case to the jury upon a theory not found in the plead-

ings and not within the issues raised by the answer.

Defendant objected to such a submission at the trial, and presses the same matter as its complaint in this court. The rule is too well settled to require the citation of authorities that instructions should be confined to the issues made by the pleadings. There is nothing in the instant case to bring it within the exception to that well established rule. The defendant did not join issue with the plaintiff upon any other theory, nor was the case tried by the parties upon any other theory.

The judgment should be reversed, and the cause remanded for a new trial. It is so ordered."

The United States Supreme Court passing on a similar question in the case of *Washington Railroad v. Bradleys*, 77 U.S. Rep., 299, and from the body of the opinion on page 303, we quote, as follows:

"It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court, can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

In *Northan v. Dutchess County Mut. Ins. Co. of Poughkeepsie*, found in 69 N.E. 222, from the body of the opinion we quote as follows:

"In this case the plaintiff failed to prove the cause of action alleged, and the evidence tending

to establish a different cause of action was objected to upon the ground that it was inadmissible under the pleadings, and no amendment was asked for. In such a case, if the plaintiff fails to prove the cause of action set up in his complaint, and proper objections are made upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in the plaintiff's favor upon a cause of action not alleged cannot be sustained on appeal, nor after trial can the pleadings be conformed to the proof. *Southwick v. First Nat. Bank of Memphis*, 84 N.Y. 420; *Truesdell v. Saries*, 104 N.Y. 164, 167, 10 N.E. 139; *Pope v. Terre Haute Car & Mfg. Co.*, 107 N.Y. 61, 13 N.E. 592; *Freeman v. Grant*, 132 N.Y. 22, 28, 30 N.E. 247; *Reed v. McConnell*, 133 N.Y. 425, 434, 31 N.E. 22; *Bradt v. Krank*, 164 N.Y. 515, 519, 58 N.E. 657, 79 Am. St. Rep. 662. Therefore it is manifest that the learned trial court erred in admitting, under the defendant's objection and exception, evidence of the verbal agreement between the parties, and also in submitting the case to the jury upon the theory that the plaintiff might recover if the jury should find that such an agreement was made. The defendant's exceptions to the admission of that evidence and to the charge of the court in that respect were well taken, and require a reversal of the judgment."

In the case of *Southern Ry. Co. v. Montgomery*, at 46 Fed. (2d) 990, from the body of the opinion on page 991, we quote as follows:

"It is well settled that in federal courts a plaintiff can recover only on the allegations of his

pleadings and cannot recover on some other act incidentally appearing in the proof. *Hines v. Jasko* (C.C.A.) 266 F. 336; *Union Pac. v. Garner* (C.C.A.) 24 F. (2d) 53; *Wash. Railroad v. Bradley*, 77 U.S. (10 Wall.), 299, 19 L. Ed. 894. It follows that the instruction was misleading and erroneous."

The Circuit Court of Appeals for the Third Circuit reiterates this statement of the law in the case of *John S. Sills & Sons, Inc. v. Bridgeton Condensed Milk Co., et al.*, 43 Fed. (2d) 72, and the second syllabus reads:

"Pleading key 48, 387. Plaintiff must state complete case in complaint and prove same as stated."

And from the body of the opinion, on page 73, we quote as follows:

"The plaintiff must state his complete case in his complaint and prove the case, as stated in his complaint."

Federal Rules of Civil Procedure 7 (a) is very definite and certain and amounts to a reiteration of the old Section 723 (c), 28 U.S.C.A., and very recently, and since the adoption of the rules, the U. S. District Court in Connecticut has occasion to pass on this question, and the opinion was affirmed, February 5, 1943. This case is *Middle West Const., Inc. v. Metropolitan Dist.*, 2 F.R.D. 117, and the first syllabus reads:

“1. Courts Key 347 (4). A reply by plaintiff and a rejoinder by defendant being unauthorized in federal civil pleading cannot be considered except as they constitute admissions against interest of the parties. Federal Rules of Civil Procedure rule 7(a), 28 U.S.C.A. following section 723c.”

and in the body of the opinion on page 117, the Court held:

“(1) 2. Plaintiff’s complaint contains a specification in extenso of plaintiff’s several claims, and defendant’s answer gives defendant’s position with regard to each one thereof. A reply by plaintiff and a rejoinder by defendant, being unauthorized in federal civil pleading, Federal Rules of Civil Procedure, 7(a), 28 U.S.C.A. following section 723c, cannot be considered except as they constitute admissions against interest of the parties;”

This is cited to support appellant’s contention that the Federal Rules of Civil Procedure do not change the general and well-settled rules as cited above in Bancroft’s Code Pleading.

In the case of *San Francisco Stevedoring Co., et al. v. Associated Industries Ins. Corp.*, 29 Pac. (2d) 890, the District Court of Appeal decided and the Supreme Court upheld them in these words:

“Plaintiff must recover on cause of action set out in complaint, and not on another cause developed in proof”.

It must be born in mind that when the case at bar was on trial and the testimony was being introduced, and the plaintiff was on the stand, and he attempted to change his cause of action from that of direct and specific contract to one of *quantum meruit*. The defendants objected to this testimony and the trial Court made the statement:

“That is the way it was pleaded in the complaint. The reply may * * *” Then overruled the objection.

That matter was objected to all the way through and at the close of the plaintiff’s testimony, the defendants moved the Court to instruct the jury to return a verdict for the defendants, while the wording used in the motion, as is shown by the record on page 86, was not exactly as it should have been for a motion to dismiss, however, the Court by hearing the arguments and by the motion itself clearly understood the defendant’s contention, and the plaintiff having emphatically testified that he had no such contract, then the Court should have dismissed the plaintiff’s cause of action for failure of proof, as well as variance, and as set forth in the U. S. Supreme Court case of *Washington Railroad v. Bradleys*, 77 U.S. 299. Wherein this great Court said:

“Nor will the fact that objection was not made below, cure a combination of errors so large and so grave as above indicated.”

It was the Court’s duty to take cognizance of the fact that the plaintiff absolutely failed to prove his

case, and by the objections to the testimony, made by the defendants throughout the hearing, some of which can avail us nothing here, due to the fact that the court reporter taking this case was not the official court reporter, but was called in for assistance, and while doing the best she possibly could, under the circumstances, did not get all of the objections and statements. However, she did get enough in the record to show specifically the contention of the defendants throughout the entire trial.

The plaintiff having sued on a direct and specific contract should not be permitted to recover on a *quantum meruit* theory, by evidence introduced over defendants' objections and this is especially true since he never even asked to amend his complaint.

We will now group statements of points, Numbers 2 and 3 for argument, which are as follows:

“2. The verdict as rendered was not supported by sufficient evidence, but was directly contrary to the evidence.”

“3. The verdict as rendered was against the law.”

We will submit these two statements of points on the law and facts set forth above. We have not set forth all of the plaintiff's testimony, but have set forth enough to clearly show that he admitted that there was no contract as sued on in this action.

We will next present statement of points, Number 4, which is as follows:

“4. The Court erred in allowing incompetent evidence to be introduced on the part of the plaintiff, over the objections of the defendants, as shown by the transcript of the testimony and the Court proceedings.”

The testimony specifically objected to commences on page 39 TR., and extends down near the bottom of page 40, which is as follows:

“Q. Prior to the time you went to work for the Headys, for whom did you work?

A. Squeaky Anderson of the Seldovia Alaska Packers.

Q. Is that a cannery?

A. Yes.

Q. In what capacity did you work for Squeaky?

A. As a carpenter. (6.)

Q. You have stated, I believe, that you have twenty years experience as a carpenter?

A. Yes, sir.

Q. How much per hour, if you remember, did Squeaky Anderson pay you?

Mr. Bell. Object as incompetent, irrelevant and immaterial. This is not on a suit quantum meruit, but on a direct contest, so pleaded.

The Court. That is the way it was pleaded in the complaint. The reply may——

Mr. McNealy. Your honor, in the reply we did state that there was no actual price agreed upon. It was an error on my part in drawing the complaint in stating that there was a stipulated amount.

The Court. What is the purpose of this question, to prove the going carpenters wages?

Mr. McNealy. Yes.

Mr. Bell. That wasn't the question.

The Court. The objection is overruled.

Q. (by Mr. McNealy). Go ahead and answer the question.

(Testimony of Lawrence E. Slavin.)

A. Squeaky paid me two dollars an hour and board and room.

Q. Was that the going carpenters wage at that time?

A. I believe that was the cannery wage at that time.

Mr. Bell. Your honor, I move to strike the answer as (7) not responsive to the question, and further that it is outside the pleadings and not within the issues.

The Court. Motion is denied.

Q. Where did you perform this work for Squeaky Anderson?

A. There at the cannery in Seldovia.

Q. Seldovia, Alaska?

A. Yes.

Q. How far is Seldovia from Homer, Alaska?

A. Approximately sixteen miles.

Q. Just across the bay?

A. Just across the bay.

Q. Just across the bay there?

A. Yes.

Q. When you went to work for Mr. and Mrs. Heady, did you expect to get paid?

Mr. Bell. I didn't catch that question.

The Court. Will the reporter read the question, please.

(The reporter read the question.)

Mr. Bell. I object as calling for a conclusion.

The Court. The objection is sustained.

Q. Were you paid?

A. No."

Then again on page 43 TR.:

"Q. What time of the year was that?

A. In October, right after I started working.

Q. By your work for the defendants, Mr. and Mrs. Heady, did they get into the hotel any sooner than they would otherwise?

Mr. Bell. Objection, calling for a conclusion of the witness.

The Court. Overruled.

Q. Did they, by reason of your work, get into the hotel sooner than they would otherwise?

A. Yes.

Q. How much sooner, if you know?

A. I couldn't say definitely, but three or four months no doubt."

Then on page 79 TR., on re-direct of the plaintiff you find the following proceedings:

"Q. Answer this yes or no. Did Mr. Heady endeavor to dump this sawmill into your lap to pay you for your wages?

Mr. Bell. Object as incompetent, irrelevant and immaterial, not within the pleadings.

The Court. It may be irrelevant and immaterial, but it is not a proper question.

Q. Did you ever get a bill of sale to the mill?

Mr. Bell. Objected to. It has been asked and answered.

The Court. Only by answer to question put by counsel for defendants. Overruled.

A. No, I never did."

Again on page 83 TR.:

“Q. Was this planer offered as a part settlement, or full settlement?

A. I understood as part settlement.

Q. What was it offered for? This labor claim?

Mr. Bell. Object to him leading the witness.

The Court. Objection sustained. You can tell what was said.

Q. Was this planer offered as a seven hundred dollar payment on this twelve hundred dollar claim?

Mr. Bell. Object to that.

The Court. It is a leading question. After all, the jury is competent to draw the conclusion as to how it was offered.”

It is quite apparent that the plaintiff was given a judgment on the theory of *quantum meruit* and not on contract and all of the above evidence being objectionable, it should have been excluded and the permitting of this to go before the jury was error as is set forth in the cases cited under the first argument.

We will now group statements of points 14, 15, and 16 for argument, which are found on pages 32 and 33 TR., which are as follows, to-wit:

“14. The Court erred in adding the words in instruction 3, in the second line, as follows: ‘or either of them,’ over the objection of the defendants’ counsel, as stated in the record, because there is no evidence of any agreement referred to only in the presence of both of the defendants.

15. The Court erred in adding to instruction 3, after it had finished reading all the instructions

to the jury, the words: 'going carpenter wages,' as shown by the transcript; by giving this added instruction, the Court inferred at least, 'going carpenter wages at Anchorage'. This was given over counsel for defendants objection, and at the instance and the request of the attorney for the plaintiff.

16. The Court erred in re-reading a part of the instructions as amended which included the words: 'at going carpenter wages,' and the Court further erred in adding an oral statement to the jury as follows: *'If such agreement was made as claimed by plaintiff, then the plaintiff is entitled to the compensation agreed upon for his services, and as bearing upon that issue, you may take into consideration all the testimony relating to compensation paid for similar work under similar conditions.'*

If you find that the agreement was entered into as claimed by the plaintiff in his complaint, *as modified by his reply*, and that he rendered services which he claims to have rendered, and that he has not been paid for such services, *then your verdict should be for the plaintiff, and against the defendant for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered.'* This instruction being given orally at a late moment after the instructions had been read, was unfair to the defendants, *and clearly left the impression with the jury that the trial judge believed the plaintiff was entitled to recover.'* (Emphasis ours.)

Before arguing this, I wish to quote from the transcript, commencing on page 129, to show that the learned trial judge by his actions, which were, of course, innocent of any intentional wrong, did lead the jury to believe that he was in favor of the plaintiff:

“The Court. Next thing in order is instructions to the jury.

Mr. Bell. Don't you think you could give instruction on that and on the idea that he did say you owe me nothing?

The Court. All the evidence is to be considered, but the defendant himself says——

Mr. Bell. But the statement that you owe me nothing and it is just a gift from heaven.

The Court. It is all before the jury.

Mr. Bell. Mr. Neskett has drawn it out in his argument.

The Court. I couldn't do that.

Mr. Bell. Let me see it before——

The Court. Oh yes, let me read this. I don't believe I could, but have you a copy of the proposed instruction?

Mr. Nesbett. Not of this one.

The Court. Copy can be given later. I don't intend to give it.

Mr. McCarrey. Exception.

The Court. Ladies and gentlemen, I will now read the instructions.

(Instructions to the jury are read by the Court.)

The Court. And I have signed the instructions as district judge. Counsel may come to the bench with the reporter.

Mr. Nesbett. I want an objection, or rather an exception, to the first paragraph of No. 3, the second line, that it should be 'defendants, or either of them', that particular wording.

The Court. All right, I shall insert that 'defendants, or either of them.'

Mr. Bell. I object to adding that, because there is no evidence of an agreement referred to only in the presence of both of them.

The Court. Exception is noted.

Mr. Nesbett. I thought the words 'going carpenters' wages' should be inserted somewhere in line 7, 8 or 9.

The Court. I will put that between 6 and 7 'at going carpenters' wages'.

Mr. Bell. Now, that would be in Homer, Alaska. It wouldn't certainly be here.

The Court. I will put a comma after wages. It would read, 'would be compensated by defendants therefor, at going carpenters' wages'.

Mr. Bell. I want to specifically except to that on the issue as it now stands complete, it infers going carpenters wages at Anchorage, and does not infer going carpenters' wages at Homer, where it was performed.

The Court. All right.

Mr. Nesbett. In another part of the instruction you say this constitutes all the testimony?

Mr. Bell. At Homer, not at Anchorage.

The Court. Suppose I insert 'at Homer, Alaska,' at that point?

Mr. Nesbett. I don't see that it should be limited to Homer.

Mr. McCarrey. I would like to point out the fact that there is quite a little evidence even by

the plaintiff that economic conditions at Homer are not so good as elsewhere, so I take exception to that being other than Homer, Alaska.

The Court. The testimony was just going carpenter's wages not particularly at Homer, Alaska.

Mr. McCarrey. Exception.

The Court. All right, Mr. Bell.

Mr. Bell. I want an exception to the first paragraph of instruction 3, for the reason that it does not state the law carefully, and places too great a burden on the defendants, and is misleading to the jury.

I want the same exception to paragraph 2 of instruction 3, commencing on line ten on instruction 3, for the same reason.

I would like an exception to the third paragraph of instruction 3 which commences on line fifteen, and extends down to and including line twenty-two; and

An exception to the fourth paragraph of instruction 3, commencing on line twenty-three, and ending on line thirty-two, for the reason that all of these instructions misstate the law probably applicable to this case, and places too great a burden on the defendants, and is based only upon the plaintiff's contention in the case, and the defendants' contentions having been completely ignored.

Mr. McCarrey. It has been ignored—that is defendants' theory of the case has been ignored, in that defendants' theory has been that it was an *agreement entered into at the time that the work began, that is the determining factor and not the reasonable value of services, or the going wages.*

The Court. *I think that maybe the last part of the last paragraph should be amended, ‘* * * for if you find that the agreement between the parties was to the effect,’ after the word ‘compensation.’*

Mr. Bell. *On line twenty-nine?*

The Court. Yes, after the word ‘compensation,’ I think probably this language ought to be inserted, ‘or if in your minds the evidence is equally balanced between the plaintiff and the defendants on this question.’

Mr. Bell. Now, your honor, I want to keep this one. There is one other here that I want to take. I take exception to instruction 7 in its entirety, for the reason that it deprives the jury of a method of reasoning the amount due, and if they do arrive at an amount by striking lots it would still have to be concurred in by all of the parties before it would be their verdict, and therefore it places too great a burden on the defendants in this case.

The Court. I don’t know whether that word should be—I will strike out ‘the compensation agreed upon,’ that is before the words ‘for his service.’

Mr. Nesbett. Strike out the word ‘reasonable.’

The Court. Yes. Do you want to take any further exceptions?

Mr. Bell. None whatever, but I do want to offer that.

The Court. The Court refuses to give the instruction No. 1 submitted by the defendants except as some parts of it may conceivably be included in the instructions. It is denied as submitted.

The Court. Ladies and gentlemen, since reading the instructions there have been changes, and I will now read it:

‘The issue in this case is a relatively simple one, and that is whether or not the plaintiff and defendants or either of them agreed that plaintiff should work for the defendant in the construction work described in the pleadings and in the testimony and would be compensated by defendants therefor, *at going carpenters’ wages, no exact amount of compensation having been agreed upon*, or whether plaintiff agreed to work for his board and lodging only.

If such agreement was made *as claimed by plaintiff*, then the plaintiff is entitled to the compensation agreed upon, for his services and as bearing upon that issue, you may take into consideration *all testimony relating to compensation paid for similar work under similar conditions*. If you find that the agreement was entered into as claimed by the plaintiff in his *complaint, as modified by his reply*, and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff is justly entitled to recover from the defendants for the services so rendered.

But unless the plaintiff has proved the averments of his complaint, as modified by his reply, by a preponderance of the evidence, your verdict should be for the defendants and against the plaintiff.’ ” (Emphasis ours.)

The above quotations from the transcript show conclusively that the errors of the trial Court caused this unconscionable verdict to be rendered by the jury. It is almost impossible for an Appellate Court to conceive the great influence that the Honorable Anthony J. Dimond, the trial judge, really has over the opinions of the jurors, and this is especially true where the average jury is about half men and half women.

I doubt if anyone could read the transcript in this case without seeing that our learned trial judge was thinking of an action on *quantum meruit* and not on contract, and, in spite of defendants' efforts, he tried the whole case on that theory.

This is reflected through the instructions given.

STATEMENT OF POINT NUMBER FIVE.

5. The Court erred in refusing to strike out certain testimony on a motion of the defendants as shown by the transcript filed herein.

On page 40 TR. you find the following proceedings:

“A. Squeaky paid me two dollars an hour and board and room.

Q. Was that the going carpenter's wage at that time?

A. I believe that was the cannery wage at that time.

Mr. Bell. Your honor, I move to strike the answer as not responsive to the question, *and*

further that it is outside the pleadings and not within the issues.

The Court. Motion is denied.” (Emphasis ours.)

In support of this motion, it is not necessary to reiterate the things said above, or recite the case above set forth. It is clear to me and I trust I am able to make my position clear to this honorable Court, that the defendants were called upon to defend an action based solely upon contract as set out in the complaint on page 2 TR., wherein the plaintiff alleges that he rendered services “*at the special instance and request of the said defendants, and for the stipulated wages of \$2.00 per hour for each and every hour so worked, by plaintiff, and in addition to said \$2.00 per hour, plaintiff was to receive board and lodging from defendants, which board was provided by said defendants.*” (Emphasis ours.)

It is so apparent that the trial judge was laboring under misapprehension of the issues of this case when he allowed the plaintiff to testify as above set forth, and then overruled defendants’ motion to strike, when it became apparent that the witness was testifying about cannery wages, and not carpenter wages, and was testifying about cannery wages in an area especially busy in the summertime, and the Court should not have overruled defendants’ motion to strike, and the overruling of the same constituted highly prejudicial error, as the only evidence of \$2.00 per hour plus board and room that was given any-

where was the testimony above quoted. You will note that I again in this objection raised the question that:

“It is outside the pleadings and not within the issues.” I submit this on the same cases cited above as they are in point here.

CONCLUSION.

In conclusion, permit me to state, for and on behalf of the defendants in this case, that an injustice has been done to the defendants. That an effort was made to correct it by a motion for a new trial, which motion was overruled.

This judgment, in my humble opinion, is a travesty on justice. While it is not so large in dollars and cents, it is very large as compared with the finances of my humble clients, and more often, errors are committed in the trial of small or less consequential cases than in the great cases involving fortunes.

The injustice done in this case is demonstrated so conclusively by the verdict, which must have been due to the confusion of the learned trial judge in permitting the trial to go ahead when the plaintiff failed completely to prove the allegations of his complaint and this trial judge, in refusing to dismiss the case, at the close of plaintiff's testimony, after the plaintiff himself had denied ever having any contract with the defendants as pleaded at all, or anything similar to it, or any contract at all, and contracts cannot be just perfected by someone's believing

that maybe sometime in the future that he would be paid for doing a little work while he was staying with the Headys, there being positively no contract to pay anything, even assuming that the plaintiff's testimony was true. The whole thing is so apparent that the jury became confused. The trial judge should never have submitted it to the jury, and should have dismissed the plaintiff's case at the close of all of the evidence.

You will note by the testimony that the plaintiff must not have been thinking that he would be paid for his work because he kept no record of it, and testified first that he worked six weeks. However, the plaintiff's attorney finally was able to get the plaintiff to admit, rather than testify, that he worked sixteen weeks of 40 hours per week, and at the same time, admitting no work on Thanksgiving, Christmas and holidays and no work during the time he was having his father's homestead surveyed out in the country; admitted that the days were cold and short; admitted that he told the Headys he had to have a place to stay until he was ready to go outside and that he didn't want to go for a while because he wanted to have his father's homestead surveyed; admitted that he never expected any pay for the first few weeks. (TR. 48.)

If you figure the time that he was in Homer and worked for the Headys as alleged in his complaint, he started to work on October 2, 1947, and the last day was the 23rd of January, 1948. If you take all of these days together, excluding the first and in-

cluding the last, you would have sixteen weeks. However, he stated he didn't expect any pay for the first few weeks. On page 57 TR., this question was asked and this answer made:

“Q. Did you work 40 hours between Christmas and New Year's?

A. I couldn't say definitely.”

Then he stated later that he stayed at the Headys' home where he was boarded until he went outside about February 5, and then returned in the early spring with his nephew, had stayed with the Headys until he left to go fishing sometime in May, he believed. Then he was asked:

“Q. Did you pay them for the accommodations then?

A. I don't believe there was anything asked for that. They put up a couple of cots and we furnished our mattresses.

Q. Who stayed there with you?

A. My nephew.”

Apparently the idea of Mr. Slavin's filing this suit was placed in his mind by the attorney who filed it. The fact that he waited almost two years before filing it, and the very fact that he never demanded pay from the Headys is an incident to be considered along with the many, many errors set forth above. Then again his statement set forth on page 48 TR. of the cross-examination of Mr. Slavin you find this question:

“Q. Those first few weeks you didn't intend to charge him?

A. I didn't think there was any charge.”

Then again on page 47 TR. he testified as follows:

“Q. I believe you said Mr. Heady told you he had no money to pay you; that he and Tommy were just building it themselves?

A. I believe so.

Q. You did know that Mr. Heady had no cash to put in it?

A. At that time, yes.”

And again on page 78 these questions and answers appear:

“Q. As I understood you a while ago, when Al told you he was going to give you his interest in the sawmill, you were very much pleased.

A. At that time.

Q. You did make some statement to him that you were very well pleased?

A. Yes, at that time.”

Since there has been a travesty on justice perpetrated by misunderstandings and errors of the trial Court, this case should be reversed, and ordered dismissed, and if the plaintiff has any claim against the Headys based upon some other contention, than the one sued upon, he will have plenty of time to file his suit and the Headys will have an opportunity to meet that suit in Court when filed.

Dated, Anchorage, Alaska.

October 18, 1950.

Respectfully submitted,

BAILEY E. BELL,

J. L. MCCARREY, JR.,

Attorneys for Appellants.

No. 12,569

IN THE

United States Court of Appeals
For the Ninth Circuit

ALFRED HEADY and ESTHER HEADY, dba
Heady Hotel,

Appellants,

VS.

LAWRENCE E. SLAVIN,

Appellee.

BRIEF FOR APPELLEE.

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FILED

NOV 29 1950

PAUL P. O'BRIEN,
CLERK

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No. 12,569

IN THE

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ALFRED HEADY and ESTHER HEADY, dba
Heady Hotel,

Appellants,

vs.

LAWRENCE E. SLAVIN,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The plaintiff, Lawrence E. Slavin, through his attorney, Robert J. McNealy, of Seldovia, Alaska, filed his complaint on September 7th, 1949 (Tr. p. 4), demanding judgment against defendants in the sum of One Thousand Two Hundred Eighty Dollars (\$1,280.00), for work performed as a carpenter for defendants over a period of sixteen weeks, between October 2nd, 1947, and January 23rd, 1948. Plaintiff further alleged in his complaint that a stipulated wage of \$2.00 per hour, plus board and room, was to be his compensation, and in the prayer of the complaint, asked for interest on the sum of One Thousand Two Hundred Eighty Dollars (\$1,280.00) from the

23rd day of January, 1948, and the sum of Five Hundred Dollars (\$500.00) as attorney's fees. Defendants filed their answer on October 4, 1949, admitting that the plaintiff did work for the defendants but denying the amount of work performed by plaintiff and in the nature of an affirmative defense, in Paragraph II of the answer (Tr. p. 5), defendants alleged that the plaintiff offered to work for his board and room only, that plaintiff insisted upon working even after he was told that defendants could not pay him for his labor. On October 19th, 1949, plaintiff filed a reply, denying each and every statement contained in defendants' answer not in full accord and agreement with plaintiff's complaint except defendants' statement that no price for work was agreed upon and alleging that plaintiff understood that he was to receive going carpenter's wages. (Tr. p. 7.) Defendants made no objection to the reply at the commencement of the trial. The trial of the case commenced on February 8th, 1950, and was submitted to the jury on February 9th, 1950. The jury returned a verdict in favor of the plaintiff for the sum of One Thousand Two Hundred Eighty Dollars (\$1,280.00), plus interest at the rate of six per cent (6%) per annum from January 23rd, 1948. (Tr. p. 8.) A motion for a new trial was filed on February 17th, 1950, and denied. Thereafter judgment issued and defendants appealed.

ARGUMENT.

Appellee will follow the order of argument chosen by appellants, and first direct argument to Points 8, 9 and 10, relied upon by appellants for reversal.

No. 8. The Court erred in not sustaining defendants' motion to dismiss the case at the close of the plaintiff's evidence. (Tr. p. 30.)

At the close of plaintiff's case the following proceedings took place (Tr. p. 86):

"Mr. McNealy. We have no more witnesses, Your Honor.

Mr. Bell. Just for the record, Your Honor, we move to dismiss and to instruct the jury to return a verdict for the defendants.

The Court. Motion is denied.

Mr. Bell. Exception.

The Court. And the exception is noted.

The Court. Witness may be called on behalf of defendants."

An application to the Court for an order shall be by motion which shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Federal Rules of Civil Procedure, Rule 7 (b) (1).

The motion made by appellants failed to state any grounds whatsoever in support of a motion to dismiss or for a directed verdict, and was properly denied by the Court.

No. 9. The Court erred in overruling the defendants' motion to dismiss at the close of all of the evidence. (Tr. p. 31.)

Appellee has searched the record diligently and can find no record that such a motion was ever made. (Tr. p. 125 through 129.)

No. 10. The Court erred in submitting on a *quantum meruit* instruction when the action was based upon an exact, explicit contract which was not proven.

Appellants' position is that under Rule 7 (a), Federal Rules of Civil Procedure, appellee's reply should be disregarded as it was not ordered by the Court.

An analysis of Rule 7 (a) indicates that the Court can require a reply to an answer and indicates by inference that the Court can permit a reply when voluntarily filed, as was the fact in this case.

The reply was voluntarily filed by plaintiff on October 19th, 1949. Defendants made no motion to strike the reply at the time it was filed nor at the commencement of the trial, three and one-half months after the reply was filed. (Tr. p. 36.)

At the commencement and throughout the trial, the Court considered the reply a part of the pleadings. (Tr. p. 39.) At page 11, Tr., in Paragraph 3 of Instruction No. 1 to the jury, the Court said:

“In his Reply to the defendants' Answer, the plaintiff denies each and every allegation made by the defendants in their Answer which is not in full accord and agreement with the plaintiff's Complaint, except only defendants' statement that, ‘No price for work was agreed upon.’ and that plaintiff understood he was ‘to have going carpenter's wages’.”

which fully indicates the Court considered the reply a part of the pleadings.

Again in Instruction No. 3 (Tr. p. 13), the Court said:

“If you find that the agreement was entered into as claimed by the plaintiff in his Complaint, as modified by his Reply, and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered.”

And again at Tr., page 134:

“If you find that the agreement was entered into as claimed by the plaintiff in his Complaint, as modified by his Reply, and that he rendered the services which he claims to have rendered, and that he has not been paid for such services, then your verdict should be for the plaintiff and against the defendants for such amount as you find the plaintiff justly entitled to recover from the defendants for the services so rendered.”

All of which proceedings clearly prove that the Court considered the reply as modifying the complaint to the extent that, as to compensation for his services, he was to receive going carpenter's wages. There was undisputed testimony that going carpenter's wages were \$2.00 per hour, plus board and room. (Tr. pp. 39 and 40.)

At page 62, Tr., the following proceedings are reported:

“Q. (Mr. Bell). There wasn’t any agreement for \$2.00 an hour?

A. I understood that if he was going to pay me wages that it would be at the going wage scale.

Q. You didn’t have an agreement with Al as to \$2.00 per hour and there wasn’t any statement about \$2.00 per hour?

A. I believe something came up because he asked me what I was getting from Squeaky in Seldovia.”

The Federal Rules of Civil Procedure became effective in Alaska on July 18, 1949. (Public Law 175 Eighty-first Congress, Chapter 343, First Session.)

Prior to that time, pleadings were covered by Section 55-5-61, Alaska Compiled Laws Annotated, 1949, which reads as follows:

“Reply: When permitted. When the Answer contains new matter, constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the Complaint, constituting a defense to such new matter in the Answer. New matter constituting a ‘defense’ as used herein, shall be deemed to include what at common law were known as matters in abatement.”

New matter in defendants' answer consisted of allegations that plaintiff offered to work for board and room; that plaintiff insisted on working even after being informed that defendants had no money to pay him for same; that he worked only as he saw fit, never a full day, never a full week (Tr. p. 5); all in the nature of affirmative or new matter to which a reply would not have been improper, prior to adoption of the Federal Rules of Civil Procedure. In his reply, plaintiff denied all of such new matter "except only defendants' statement that no price for work was agreed upon in that plaintiff understood that he was to have going carpenter's wages". (Tr. p. 7.)

While the above quoted portion of the reply might appear to be inconsistent with the complaint, upon analysis it is not, as it merely states in effect that even though no definite amount was agreed upon, plaintiff was to have the going wage, which is identical with the amount mentioned in the complaint, to-wit, \$2.00 per hour.

The case of *Zydney v. New York Creditmen's Association*, CCA 2nd, 113 Fed. (2d) 986, cited by appellants on page 18 of their brief, involved a situation where a complete departure from the rules of pleading had occurred.

Instead of filing a proper answer, the Trustee in Bankruptcy filed an "Answering Affidavit", to which a "Reply Affidavit" was filed, which was argumentative and contained much new matter. The case was not decided on the point of pleading raised, but on

the fact that pledgee had failed to retain dominion over the pledged property.

In *Carpenter v. Rohm and Hass Co., Inc.* (Civ 976), 75 Fed. Sup. 732, cited by appellants on page 18 of their brief, would not be applicable in the case at bar. There the district judge himself refused to consider the reply and supplementary reply because irrelevant and objectionable and had not been ordered by the Court. In this case, the reply was authorized and accepted by the Court and considered in instructions to the jury.

Appellants' contentions that permitting appellee to prove the going carpenter's wage amounted to a variance between pleadings and proof is without sound basis.

On the matter of variance, Section 55-5-71, Alaska Compiled Laws Annotated, 1949, provides:

"Variance: When material: Proof: Ordering amendment. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled; and thereupon the Court may order the pleading to be amended upon such terms as shall be just."

The above quoted section was construed by this Court in *Balabanoff v. Kellogg, et al.*, No. 9419, CCA

9th, 118 Fed. (2d) 597. Rehearing denied January 15th, 1941. In denying a rehearing (page 599), Judge Healy said:

“Appellant has petitioned for rehearing. The chief proposition urged in support of the petition is that the Court lacked power to treat the complaint as amended to conform to the proof. Petitioner says that the governing rule is contained in Section 3456, Compiled Laws of Alaska, 1933 (now ACLA Sec. 55-5-76) and that this statute requires that the amendment be made before submission of the case.

“Rule 15 (b) of the Rules of Civil Procedure, 28 USCA, following Section 723 (c) provides in part: ‘When issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but the failure so to amend does not affect the result of the trial of these issues.

“Whether the Federal rules are applicable to trials in Alaska, we need not inquire. This particular rule is merely an application of the principle prevailing generally in the States and Territories having systems of code pleading. The Alaska statutes, as found in Chapter 78, Sections 3451, et seq. of the 1933 Code, are in the main identical with those of the code states. Section 3451 provides: ‘No variance between the allegation in a pleading and the proof shall be deemed

material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits * * *'. Section 3452 states: 'When the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.' And Section 3461 provides that: 'The Court shall in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.'

"The view here expressed is fully supported by *Black v. Teeter*, 1 Alaska 561, at pages 564, 565. Rehearing denied."

Plaintiff at no time during the trial alleged that he was misled to his prejudice in maintaining his defense upon the merits. If such allegation had been made by the defendants, the Court, under the provisions of the second sentence of Section 55-5-71, ACLA 1949, would have required that defendants prove to the satisfaction of the Court in what respect they had been misled, and if that proof had been satisfactory to the Court, the Court could then have ordered that pleadings be amended upon such terms as might be just.

In this case the defendants were on notice that plaintiff was demanding compensation for work performed on defendants' hotel between October 2nd, 1947, and January 23rd, 1948, at the stipulated rate of \$2.00 per hour based on a forty-hour week, as soon

as they were served with the complaint. Plaintiff filed a reply three and one-half months before the trial admitting that there was no agreed rate but alleging that he was to receive going carpenter's wages. No objection to the reply was made at the commencement of the trial. Defendants' defense could not possibly have been prejudiced because the only issues they had to meet under the pleadings were whether plaintiff had actually been employed, whether he had performed the work alleged for a stipulated wage or for the going carpenter's wage.

Appellants have grouped statement of points Nos. 2 and 3 for argument and submitted these points on the law and facts contained in their brief.

No. 2. The verdict as rendered was not supported by sufficient evidence, but was directly contrary to the evidence.

No. 3. The verdict as rendered was against the law.

Appellee will likewise submit argument on these points on the law and facts set forth hereinbefore.

No. 4. The Court erred in allowing incompetent evidence to be introduced on the part of the plaintiff, over the objections of the defendants, as shown by the transcript of the testimony and the Court proceedings.

Appellants' argument that evidence of the going carpenter wage was objectionable by reason of incompetence would hardly seem to apply in view of the undisputed testimony of the plaintiff that he had twenty years' experience as a carpenter (Tr. pp. 39-

40), and had been a member of the union for a number of years. (Tr. p. 54.)

On pages 32 and 33 of their brief, appellants have grouped points Nos. 14, 15 and 16 for argument.

No. 14. The Court erred in adding the words in instruction 3, in the second line, as follows: "or either of them", over the objection of the defendants' counsel, as stated in the record, because there is no evidence of any agreement referred to only in the presence of both of the defendants.

In instruction No. 3 (Tr. p. 12) it is to be noted that the wording is:

"The issue in this case is a relatively simple one, and that is whether or not the plaintiff and defendants *or* either of them agreed * * *"

By using the conjunction, the Court properly left to the jury to find whether the plaintiff *or either of the defendants had reached* an employment agreement of any type. (Emphasis supplied.)

At Tr., page 130, the following proceedings are reported:

"Mr. Nesbett. I want an objection, or rather an exception, to the first paragraph of No. 3, the second line, that it should be 'defendants, or either of them', that particular wording.

The Court. All right, I shall insert that 'defendants, or either of them.'

Mr. Bell. I object to adding that, because there is no evidence of an agreement referred to *only* in the presence of both of them." (Emphasis supplied.)

The objection of counsel for appellants to the added wording was that there was no evidence of an agreement to perform work only in the presence of both defendants, while the obvious intent of the Court was to place fairly before the jury the question of whether the defendants, *or either of them* (emphasis supplied), had made such an agreement with plaintiff; it being obvious that an agreement by Mr. Heady would be binding on Mrs. Heady, or vice versa. As the instruction stood before amendment, the jury might have inferred that any such agreement must have been made by both defendants.

No. 15. The Court erred in adding to instruction 3, after it had finished reading all the instructions to the jury, the words: "going carpenter wages", as shown by the transcript; by giving this added instruction, the Court inferred at least, "going carpenter wages at Anchorage". This was given over counsel for defendants' objection, and at the instance and the request of the attorney for the plaintiff.

Appellee's interpretation of the added wording in the instruction has no basis in the testimony. The only direct evidence of the going carpenter wage in the Homer area in 1947 appears at page 40, Tr., and is to the effect that appellee received \$2.00 per hour and board and room at Seldovia, Alaska (near Homer), while doing construction work for a cannery.

No. 16. The Court erred in re-reading a part of the instructions as amended which included the words: "at going carpenter wages" and the Court further erred in adding an oral statement to the jury as fol-

lows: "If such agreement was made as claimed by plaintiff, then the plaintiff is entitled to the compensation agreed upon for his services, and as bearing upon that issue, you may take into consideration all the testimony relating to compensation for similar work under similar conditions, etc.

This amounted to nothing more than a re-reading by the Court of instruction No. 3, as amended (Tr. pp. 12-13 and Tr. pp. 133-134) and was entirely proper.

At page 134, Tr., after re-reading the instruction as amended, the Court said:

"The Court. Now, these are no more important than the rest of the instructions, and are a part of the instructions. They are entitled to just as much consideration as the other instructions."

No. 5. The Court erred in refusing to strike out certain testimony on a motion of the defendants as shown by the transcript filed herein. (Appellants' Brief, p. 39.)

Testimony which appellants contend should have been stricken commences at page 40, Tr., and concerns going carpenter wages. Appellee will submit this question on the law and facts previously discussed.

In line 6, of the last paragraph on page 40 of appellants' brief, the following wording appears:

"* * * when it became apparent the witness was testifying about cannery wages, *and not carpenter wages*, * * *" (emphasis supplied).

This amounts to a misstatement of the testimony.
(See Tr. p. 39):

“Q. Prior to the time you went to work for the Headys for whom did you work?

A. Squeaky Anderson of the Seldovia Alaska Packers.

Q. Is that a cannery?

A. Yes.

Q. In what capacity did you work for Squeaky?

A. As a carpenter.”

EVIDENCE.

Only three witnesses testified at the trial, the plaintiff and the two defendants. The plaintiff testified that he had lived in Homer, Alaska, off and on since 1920, that his occupation was that of carpenter and fisherman; that he had been a carpenter about twenty (20) years; that he began work for the defendants on October 2nd, 1947, and worked for them until January 22nd or 23rd. (Tr. p. 37.) Plaintiff further testified (Tr. p. 41) that the second day he was helping with the carpenter work of the Heady Hotel that the defendant, Alfred Heady, told him that at that time he couldn't see his way clear to pay the plaintiff wages but that he was keeping track of the time and he would pay plaintiff at a later date. On the strength of that, plaintiff sent for his tools at Seldovia, Alaska, and continued to perform skilled carpenter work on the hotel building; that prior to coming to work for the Headys he had been employed by one,

Squeaky Anderson, of the Seldovia Alaska Packers as a carpenter in cannery construction work (Tr. p. 39); that Squeaky Anderson paid him \$2.00 an hour and board and room, which was the going carpenter's wage at that time. (Tr. p. 40.) At page 42, Tr., plaintiff testified that he wired to Seldovia to have his tools brought over on the strength of the defendant Alfred Heady's statement that he needed someone, that he couldn't pay the plaintiff then, but he was keeping track of the time and at a later date would reimburse plaintiff, and for that reason alone the plaintiff sent for his tools and paid transportation charges himself. Plaintiff testified that during the course of his employment he installed fifty-four double sash windows and a couple of single sash windows, ten outside doors, made, set the frames for all the chimneys, laid the biggest part of both subfloors and built stairways, finished up living quarters (defendants') in the back end of the hotel and then commenced finishing up rooms upstairs. (Tr. p. 44.) Plaintiff's testimony at page 126, Tr., indicates that on October 25th when it is alleged he was willing to work for board and room only, he had approximately Three Thousand Dollars (\$3,000.00) in the bank. The defendant, Alfred Heady, testified that on or about October 2nd, 1947, the plaintiff stated to him that he would like to help out on the building and that he, Alfred Heady, replied that he would like to have the help; that he hadn't any money and didn't need him. (Tr. p. 89.) Alfred Heady's testimony on page 89, Tr., and page 90, Tr., appears contradictory in that he stated to the plaintiff that he would like

his assistance but had no money and didn't need the plaintiff's assistance, plus the fact that materials were hard to get. However, on cross-examination reported at page 105, Tr., and following, Alfred Heady testified that he had windows and doors on hand, most of them, about 2,000' of celotex, that the dimensions of each floor of the building were 28' x 80', that he had enough subflooring on hand at the time the plaintiff arrived to complete the subflooring. The testimony of the defendant, Esther Heady, commencing at page 119, Tr., is generally to the effect that the plaintiff was told that there was no work for him and was not encouraged to stay around the Heady Hotel.

CONCLUSION.

A decision on all of the legal points raised by appellants would seem to depend upon whether or not there was such a variance between plaintiff's pleadings and proof as to prejudice appellants' defense to the action at the trial.

Appellants made no objection to the reply at the time of filing or at the commencement of the trial. The Court clearly authorized the reply and considered it throughout the trial and in its instructions. Appellants knew that the question of going carpenter wages would be an issue three and one-half months before trial. Appellants raised no point on the question of variance in their motion for a new trial. (Tr. p. 19.) In objecting to the introduction of testimony concerning going carpenter wages, appellants did not

state that they were misled to their prejudice in maintaining a defense upon the merits and made no attempt to prove such to the satisfaction of the Court as is required by Section 55-5-71, Alaska Compiled Laws Annotated, 1949.

The action of the trial judge in proceeding with the trial and overruling appellants' objection was in accordance with the discretion given him by Section 55-5-72, ACLA, 1949, which reads as follows:

“Order when variance immaterial. When the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.”

The action of the trial judge is further supported by Section 55-5-81, ACLA 1949, which reads as follows:

“Disregard of defects. The Court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.”

The above quoted sections were cited with approval by this Court in *Balabanoff v. Kellogg et al.*, No. 9419, CCA 9th, 118 Fed. (2d) 597 in denying a rehearing on the question of variance, citing *Black v. Teeter*, 1 Alaska 561; and in *James et al. v. Nelson et al.*, No. 8147, CCA 9th, 90 Fed. (2d) 910.

The attention of this Court is also invited to *Wells v. Crawford*, C. of A., Colorado, 127 Pac. 914, which was an action on a written contract where the evidence

showed abandonment of the contract and attempt to collect for the reasonable value of the services. The defendant failed to object on the ground of variance and failed to include variance as a point in a motion for new trial.

In headnote No. 1, the following is reported:

“The variance between the complaint, alleging an agreed compensation for services and the proof of reasonable value of the services must be disregarded, if defendant was not misled thereby, and substantial justice resulted.”

It is submitted that appellants were not misled and actively attempted to meet the issue concerning the going carpenter wage, that the contradictory testimony of plaintiff and defendants on this issue and on the amount of work performed by plaintiff was fairly placed before the jury by the trial judge and the jury's verdict should not be disturbed.

Dated, Anchorage, Alaska,
November 29, 1950.

Respectfully submitted,

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